Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ROBERT CABRAL,

Petitioner,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To qualify for coverage under the Jones Act, 46 U.S.C. App. § 688(a), "a seaman must have a connection to a vessel . . . that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Must an injured employee work on the high seas (as opposed to the navigable waters of an ocean harbor) to satisfy this requirement?

LIST OF PARTIES

All parties to the proceeding in the court of appeals appear in the caption of the case. Ten "John Doe" defendants were named in the complaint but were not parties to the proceeding in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Cabral respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended, reprinted as Appendix A ("App. A"), *infra*, at page 1a, is officially reported at 128 F.3d 1289 (CA9 1997). The order amending the original opinion (but not the amended opinion) is also reported at 1998 AMC 275.

The unamended opinion of the court of appeals, reprinted as Appendix B ("App. B"), *infra*, at page 12a, is officially reported at 118 F.3d 1363 (CA9 1997). It is also reported at 1997 AMC 2419.

The district court's Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Cross Motion for Summary Judgment, reprinted as Appendix C ("App. C"), *infra*, at page 21a, is reported at 1995 AMC 2099 (D. Haw. 1995). It has not been officially reported.

The district court's Order Denying Plaintiff's Motion for Reconsideration of Order Dated June 19, 1995 Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Cross Motion for Summary Judgment, reprinted as Appendix D ("App. D"), *infra*, at page 31a, is unreported.

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit, which was dated and entered on October 15, 1997. On January 6, 1998, Justice O'Connor extended the time for filing a petition for certiorari to and including February 12, 1998. This petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1333(1) and 46 U.S.C. App. § 688(a).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. App. § 688(a), provides, in relevant part, as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

STATEMENT

The Jones Act, 46 U.S.C. App. § 688(a), gives a "seaman" a negligence action against his employer, but does not explicitly define the key term "seaman." This case addresses whether that term is limited to "blue-water seamen," who are employed on traditional ocean-going

vessels, or whether it also includes "brown-water seamen," who work on other vessels, such as those plying lakes, rivers, canals, and harbors.

Respondent Healy Tibbitts Builders, Inc.,[1] hired petitioner Robert Cabral on August 15, 1994, *see* R. 12, 72-74,[2] to operate the crane on Barge 538, a "crane barge," on a construction project in Pearl Harbor, Hawaii.[3] Petitioner's work involved removing and replacing the Ford Island Ferry "mooring dolphins," which are timber piles driven into the bottom of the harbor to cushion the ferry during landing. *See* R. 76. While so employed, petitioner spent more than ninety percent of his work time aboard Barge 538. *See* R. 75 (testimony of Richard A. Heltzel, respondent's vice-president).

On September 26, 1994, petitioner was injured on Barge 538 in the course of his employment. *See* R. 1, 3-6. He sued respondent under the Jones Act. Claiming to be a "seaman" as a matter of law, he sought summary judgment on the issue, and respondent cross-moved for summary judgment. As most of the requisites for seaman status were clearly established, the litigation below focused on only two issues: whether Barge 538 was a

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[1] Respondent's name is misspelled, as "Healy *Tibbits* Builders, Inc.," in the captions of the opinions below.

[2] Citations to Plaintiff-Appellant Robert A. Cabral's Excerpts of Record in the Ninth Circuit are cited with "R." and the page number.

[3] Respondent had previously employed petitioner for 10½ months ending May 31, 1994. *See* R. 11, 73. During the 2½ months between June 1, 1994, and August 14, 1994, petitioner had either worked for another employer or been unemployed. *See* R. 11, 62-63.

"vessel" and whether petitioner had a sufficient connection with it.

The district court, after a full discussion of the governing precedent, *see* App. C, *infra*, at 25a-28a, "assum[ed] without deciding" that Barge 538 was a "vessel," *id.* at 28a. But the court granted respondent's cross-motion for summary judgment, resting its conclusion that petitioner did not have the required connection with the vessel on two factors. First, the court looked to petitioner's "overall employment as a crane operator,"[4] rather than "the brief period" of his current employment with respondent, *id.* at 28a, and concluded that "[m]uch, if not most, of his work [other than his current employment] was done on land," *id.* at 28a-29a. On that view, petitioner's "connection with Barge 538 was at best transitory." *Id.* at 29a. Second, the court believed that "his work . . . in a sheltered harbor is hardly the sort of employment that would regularly expose him to the 'perils of the sea.' " *Id.* at 29a.

The Ninth Circuit affirmed. Without reaching the "vessel" question, *see* App. B, *infra*, at 20a n.1; *cf.* App. A, *infra*, at 11a n.2, the court of appeals agreed that petitioner did not have the requisite connection with Barge 538. In reaching its conclusion, the court relied on language from two of this Court's recent opinions, *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), that discuss whether an employee goes "to sea." *See* App. B, *infra*, at

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[4] In particular, the court considered petitioner's 10½-month period of employment ending May 31, 1994. *See supra* note 3.

18a-19a; *cf.* App. A, *infra*, at 9a-10a. In particular, the *Papai* Court had declared that "the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." 117 S. Ct. at 1540. *See also Latsis*, *supra*, 515 U.S. at 370 ("The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' ") (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)). The Ninth Circuit read this language to refer to the high seas or the open sea, as opposed to the ocean harbor on whose waters petitioner worked. The Ninth Circuit accordingly denied petitioner's seaman status as a matter of law because he "present[ed] no evidence showing that he was ever aboard Barge 538 when it was anywhere but the Ford Island Ferry project." App. B, *infra*, at 19a; *cf.* App. A, *infra*, at 10a.

On petition for rehearing, the Ninth Circuit amended its opinion slightly to correct an obvious error, *see* App. A, *infra*, at 2a-3a, but otherwise adhered to its original views.

REASONS FOR GRANTING THE PETITION

The court of appeals erred on a recurring and significant issue of law on which the federal courts of appeals and state courts are divided. Contrary to the Ninth Circuit's holding, a worker need not work on the high seas to qualify as a seaman under the Jones Act. This Court has held on numerous occasions that crew members of

vessels plying inland navigable waters are entitled to seaman status under the Jones Act. Both before and after this Court's recent decisions in *Latsis* and *Papai*, the courts of appeals and state courts of last resort have routinely recognized that a worker's status as a seaman is not adversely affected simply because his vessel is not deployed on the high seas. The Ninth Circuit's contrary holding creates a different rule for the West Coast of the United States on a matter of significance for tens of thousands of brown-water seamen and for their employers, who must procure different insurance depending on the locations of their work force. Accordingly, plenary review is warranted.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, WITH COURT OF APPEALS' DECISIONS IN OTHER CIRCUITS, AND WITH DECISIONS OF STATE COURTS

Supreme Court Precedent

This case turns on the requirement announced in *Latsis, supra*,[5] that "a seaman must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature."[6] 515 U.S. at 368. During

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[5] In *Latsis*, this Court declared "that the essential requirements for seaman status are twofold." 515 U.S. at 368. The first requirement – that the employee's duties contributed to the function of the vessel or the accomplishment of its mission – is not at issue here. Respondent did not dispute that petitioner's duties operating the crane contributed to the function of the crane barge. *See* App. A, *infra*, at 7a.

[6] Whether Barge 538 was a vessel is not currently before the Court, because the Ninth Circuit did not reach the question. In

the relevant period of employment,[7] petitioner spent more than ninety percent of his work time aboard Barge 538 performing duties essential to the vessel's mission. In view of the thirty percent "rule of thumb" that this Court approved in *Latsis*, *id.* at 371, there is no legitimate basis for doubting that petitioner's connection with the vessel was substantial in duration. The court below evidently believed that "substantial in . . . nature" means work on the high seas. There is no precedent for that notion.

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any event, the district court was fully justified in attributing vessel status to Barge 538, which was functionally indistinguishable from the barge that this Court found to be a vessel in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

[7] At the time the district court reached its decision, it may have been unclear what period of employment should be considered to determine the nature of petitioner's connection to Barge 538. *See supra* note 3. This may explain why that court considered his "overall employment as a crane operator." App. C, *infra*, at 28a; *see supra* note 4 and accompanying text. After *Latsis* and *Papai*, however, it is clear that the court should have looked to the period of employment beginning August 15, 1994. *See, e.g., Papai, supra*, 117 S. Ct. at 1542 (describing the employee's prior work for the vessel owner during the 2½ months before his injury as "discreet engagements [that] were separate from the one in question"). As this Court explained in *Latsis*, "[i]f a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." 515 U.S. at 372. Petitioner's assignment changed dramatically on August 15; indeed, because he had left respondent's employment entirely for 2½ months, he had to be rehired.

In elaborating on the seaman status test, this Court has made clear that an injured worker must be a "member[] of the crew of a vessel plying in navigable waters." *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946); *see also O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42-43 (1943) (noting the requirement of a "vessel plying in navigable waters"). Lower courts have continued to recognize and apply this requirement. *See, e.g., Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (CA3 1994). It is the only requirement relating to location. Petitioner easily satisfies it, because Barge 538 was operating in the navigable waters of Pearl Harbor.

The Ninth Circuit's imposition of a far more restrictive location test was not only unwarranted, it was flatly inconsistent with a number of this Court's decisions. The *O'Donnell* Court paid the greatest attention to issues of location. In that case, a deckhand was injured on land while in the service of a vessel transporting sand on Lake Michigan. The Seventh Circuit had held that no recovery was available when the injury did not occur on navigable waters. Reversing, this Court held that the deckhand could recover under the Jones Act as a matter of law, notwithstanding that he was injured on land, because he was a member of the crew of a vessel that operated on navigable waters (albeit not the open sea). 318 U.S. at 42-43.

In at least[8] five other cases, this Court has recognized that seamen who never worked on the high seas were

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[8] In *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129 (1959), the Court held that the mate on a barge was entitled to recover under the Jones Act. At the time of his injury, he was doing construction work while the barge was moored in an ocean

entitled to Jones Act coverage. Most recently, this Court upheld the potential availability of a Jones Act remedy for an injured employee who did all of his work on a barge in San Diego Harbor or on land. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).[9] This result follows a long line of cases. In *Warner v. Goltra*, 293 U.S. 155 (1934), the Court held that the master of a river tugboat who had been killed on the Ohio River was a Jones Act seaman. In *Norton v. Warner Co.*, 321 U.S. 565 (1944), a boatman on a barge that "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia," *id.* at 567, was found to be a seaman entitled to recover under the Jones Act. In *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), this Court affirmed a jury finding that a Jones Act plaintiff was a member of the crew of a dredge that was anchored to the Illinois shore of the Mississippi River "during all the time petitioner worked for [the vessel owner]." *Id.* at 372; *see also id.* at 376 (Harlan, J., dissenting) (the plaintiff "never even saw [the dredge] being moved"). And in *Butler v. Whiteman*, 356 U.S. 271 (1958) (per curiam), the Court held that a jury could decide the seaman status of a crewman on a Mississippi River tug.

The use of phrases such as "perils of the sea," going "to sea," and "sea-based employees" in *Papai* and *Latsis*

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harbor. The published opinions do not reveal whether the barge (or the injured worker) ever went on the open sea.

[9] In its original opinion, the court below overlooked *Gizoni*. *See* App. A, *infra*, at 2a-3a; *compare* App. A, *infra*, at 6a & n.1 *with* App. B, *infra*, at 15a.

could not have been intended to overrule *O'Donnell, Gizoni, Warner v. Goltra, Norton v. Warner Co., Senko,* and *Butler*. In this context, "sea" is simply a convenient shorthand for "navigable waters." Indeed, this Court has regularly used "sea" when all navigable waters must have been intended. *See, e.g., Latsis, supra,* 515 U.S. at 364 (characterizing the *Gizoni* worker's time in San Diego Harbor as "time at sea"); *id.* at 373 (contrasting "out of navigation" with "at sea" in the context of holding that a six-month period in drydock may be time "in navigation"). This usage goes back to the early Jones Act cases. In *Warner v. Goltra, supra,* for example, the Court mentioned a definition of "a seaman" as "one who lives his life upon the sea" in the context of the master of a river tugboat. 293 U.S. at 157. (This language was quoted in *Latsis, supra,* 515 U.S. at 355.) In contrast, when the *Papai* or *Latsis* Court meant to limit the meaning of the term "sea" in the manner suggested by the Ninth Circuit, it used a phrase such as "the high seas," *Papai, supra,* 117 S. Ct. at 1543, or "the open sea," *Latsis, supra,* 515 U.S. at 351. *Cf. id.* at 356 (noting that a "blue-water seaman" is at one end of a broad spectrum, and recognizing that others on that spectrum are still entitled to "seaman" status) (quoting *Brown v. ITT Rayonier, Inc.,* 497 F.2d 234, 236 (CA5 1974)).

In summary, petitioner is not seeking a novel expansion of Jones Act coverage. He is simply seeking the restoration of the traditional understanding of seaman status that this Court has recognized in opinions stretching over almost sixty years. At the very least, petitioner's status is a fact question that should have been decided at trial rather than on summary judgment. *See, e.g., Latsis,*

supra, 515 U.S. at 369; *Gizoni, supra*, 502 U.S. at 92; *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991); *Senko, supra*, 352 U.S. at 374.

Circuit Court Precedent

The Ninth Circuit's decision conflicts with decisions in virtually all of the other circuits, which do not require an injured employee to work on the high seas to qualify for seaman status. *See, e.g., Bennett v. Perini Corp.*, 510 F.2d 114, 115-17 (CA1 1975) (seaman status question should have gone to the jury; the injured employee's work was confined to a bridge construction project in Narragansett Bay); *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30 (CA2 1996) (reversing summary judgment for the employer; the injured employee worked on a stationary barge on a bridge construction project in Jamaica Bay); *Tyndall v. Conduit & Foundation Corp.*, 269 F.2d 947 (CA3 1959) (affirming recovery; injured employee worked on the Delaware River and other "navigable streams" on bridge-building and dredging projects); *Summerlin v. Massman Const. Co.*, 199 F.2d 715, 715-16 (CA4 1952) (holding the plaintiff to be a seaman as a matter of law; work was confined to a floating derrick on a bridge construction project on the York River); *Ducote v. V. Keeler & Co.*, 953 F.2d 1000 (CA5 1992) (reversing summary judgment for the employer; the injured employee worked on a spud barge on a piledriving project on the Red River); *Petersen v. Chesapeake & Ohio Ry.*, 784 F.2d 732, 737-38 (CA6 1986) (affirming recovery; injured employee worked on car ferries sailing on the Great Lakes); *Kelley v. Sun Transportation Co.*, 900 F.2d 1027 (CA7 1990) (affirming recovery; injured employee worked on a towboat on the Missouri

River); *Slatton v. Martin K. Eby Const. Co.*, 506 F.2d 505 (CA8 1974) (affirming recovery; injured employee worked on a barge constructing a "dolphin" on the Arkansas River), *cert. denied*, 421 U.S. 931 (1975); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (CA11 1987) (affirming recovery; injured employee worked on a dredge and barge in the St. Johns River), *cert. denied*, 486 U.S. 1033 (1988).

All of these modern cases take for granted the absence of a "high seas" requirement, because the issue was settled over a century ago in a pre-Jones Act case.[10] In *Saylor v. Taylor*, 77 F. 476 (CA4 1896), the employees on a "stream dredge," which was engaged in cleaning and deepening the channels in two Virginia creeks, claimed seaman status. The Fourth Circuit specifically considered whether it should "class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic." *Id.* at 479. The court held that "those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners. . . . " *Ibid. See also, e.g., The Bouker No. 2*, 241 F. 831, 833 (CA2) (Hough, J.) ("an engineer, *even*

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[10] Early cases are still authoritative on the meaning of the Jones Act. As this Court held in *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991), when Congress used the term "seaman" in the statute it intended the same meaning that admiralty courts had previously given to the term.

on a harbor tugboat, is a seaman") (emphasis added), *cert. denied*, 245 U.S. 647 (1917).

Except in the Ninth Circuit, no other court has read *Papai* and *Latsis* to alter this well-established doctrine. The continuing validity of the rule announced in *Saylor v. Taylor* is illustrated by the decisions since *Papai* and *Latsis* in which federal courts have adhered to the doctrine and upheld seaman status for brown-water seamen. *See, e.g., Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30 (CA2 1996) (reversing summary judgment for the employer; the injured employee worked on a stationary barge on a bridge construction project in Jamaica Bay); *Moyer v. Johnson Brothers Corp.*, 1997 U.S. Dist. LEXIS 14683, 1997 WL 582820 (E.D. La., Sept. 19, 1997) (No. CIV. A. 96-885) (denying employer's motion for summary judgment; injured employee worked on barges in bridge construction projects).

State Court Precedent

Consistent with *Saylor v. Taylor*, state courts of last resort have regularly recognized that Jones Act coverage is available to those who do not work on the high seas. Perhaps the most striking example can be found in a recent decision of the Louisiana Supreme Court, which held that an employee on an "airboat" operating on marshland near Sulphur, Louisiana (over 30 miles inland from the Gulf of Mexico), could qualify for seaman status. *See Coleman v. Robicheaux Airboats, Inc.*, 662 So.2d 452 (La. 1995) (per curiam) (reversing 657 So.2d 1331 (La. App. 1995)).

State courts of last resort have similarly protected crewmen, such as petitioner here, who worked on vessels in ocean harbors. *See, e.g., Arundel Corp. v. Jasper*, 219 Md. 519, 150 A.2d 415 (1959) (affirming recovery; injured employee worked on a dredge only in Baltimore Harbor); *Toland v. Atlantic Gahagan Joint Venture Dredge*, 57 N.J. 205, 271 A.2d 2 (1970) (per curiam) (affirming intermediate appellate court's reversal of summary judgment for the employer; injured employee worked on a dredge in Newark Bay); *B-R Dredging Co. v. Rodriguez*, 564 S.W.2d 693 (Tex. 1978) (affirming recovery; injured employee worked on a tender boat in support of a dredge in the Corpus Christi ship channel); *Weeks Marine v. Gillikin*, 247 Va. 89, 439 S.E.2d 341 (1994) (remanding for trial on other issues, but recognizing seaman status of an employee on a work boat in a harbor dredging project).

Brown-water seamen on the nation's lakes and rivers have also been held to be Jones Act "seamen" in the state courts of last resort. *See, e.g., Allen v. Mobile Interstate Piledrivers*, 475 So.2d 530 (Ala. 1985) (reversing NOV judgment for the employer; injured employee worked from a river barge on bridge construction projects); *American Barge Line Co. v. Leatherman's Adm'x*, 306 Ky. 284, 206 S.W.2d 955 (1947) (affirming recovery; injured employee worked on a river boat); *Russell v. Pere Marquette Ry. Co.*, 245 Mich. 624, 223 N.W. 230 (1929) (affirming recovery; injured employee worked on a Lake Michigan car ferry), *cert. denied*, 279 U.S. 864 (1929); *Brannan v. Great Lakes Dredge & Dock Co.*, 253 Minn. 28, 91 N.W.2d 166 (1958) (reversing directed verdict for the employer; injured employee worked on dredges on the Great Lakes); *Pedersen v. Manitowoc Co.*, 25 N.Y.2d 412, 418-19, 255 N.E.2d

146, 149-50 (1969) (reinstating trial court's judgment for the plaintiffs, which had been reversed by the intermediate appellate court; injured employees worked from a crane barge anchored in the Hudson River for a bridge construction project); *Brown v. L. A. Wells Constr. Co.*, 143 Ohio St. 580, 585-86, 56 N.E.2d 451, 454-55 (Ohio 1944) (affirming intermediate appellate court's reversal of directed verdict for the employer; injured employee worked on a drill scow on Lake Eire); *Rankin v. Iron City Sand & Gravel Corp.*, 356 Pa. 548, 52 A.2d 455 (1947) (affirming recovery; injured employee worked on a river tow boat); *Indiana & Michigan Electric Co. v. Workers' Compensation Commissioner*, 184 W. Va. 673, 403 S.E.2d 416 (W. Va. 1991) (holding that "a chief engineer . . . responsible for maintaining the engines of motor vessels that transport coal barges along the Ohio and Kanawha Rivers" cannot pursue a workers' compensation claim because he is a Jones Act seaman).

This conflict is particularly serious in the states of the Ninth Circuit, where the risks of state/federal forum-shopping[11] compound the general problems created when different courts provide different remedies to similarly situated plaintiffs bringing their actions under the

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[11] The "saving to suitors" clause, 28 U.S.C. § 1333(1), guarantees injured seamen access to state courts. Once filed in state court, Jones Act actions are not removable to federal court. *See, e.g., Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 207 (CA5 1993) ("It is axiomatic that Jones Act suits may not be removed from state court because 46 U.S.C. App. § 688 (the Jones Act) incorporates the general provisions of the Federal Employers' Liability Act, including 28 U.S.C. § 1445(a), which in turn bars removal.").

same federal statute. In California, where there are more maritime workers than in the rest of the states of the Ninth Circuit combined,[12] the state supreme court long ago recognized that a maritime worker can qualify for seaman status without going on the high seas. In *Sanguinetti v. Moore Dry Dock Co.*, 36 Cal.2d 812, 228 P.2d 557 (1951), an injured employee spent 40% of his work time on land and 60% on a tugboat in the Oakland Estuary and elsewhere in San Francisco Bay. The court summarily rejected the defendant's contention that the employee was not a seaman. *Id.* at 814-15, 228 P.2d at 558-59. In more recent years, the California appellate courts have regularly held seamen entitled to recover under the Jones Act or permitted seaman status issues to go to the jury when the plaintiff did not work on the high seas. In *Soucie v. Trautwein Brothers*, 275 Cal. App.2d 20, 79 Cal. Rptr. 671 (1969), the best-known of these cases, the court held that a "pile butt" who worked on a derrick barge constructing a seawall in Newport Harbor was a seaman as a matter of law. The only location requirement was that the "barge [was] a vessel . . . operating and working in navigable waters." *Id.* at 26, 79 Cal. Rptr. at 675.

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[12] *Compare* BUREAU OF THE CENSUS, DEP'T OF COMMERCE, COUNTY BUSINESS PATTERNS 1995: CALIFORNIA 1 (1997) (reporting 17,112 "water transportation" workers in California) *with, e.g.*, COUNTY BUSINESS PATTERNS 1995: WASHINGTON 1 (1997) (7,985 water transportation workers); COUNTY BUSINESS PATTERNS 1995: HAWAII 1 (1997) (3,816 water transportation workers); COUNTY BUSINESS PATTERNS 1995: OREGON 1 (1997) (2,398 water transportation workers); COUNTY BUSINESS PATTERNS 1995: ALASKA 1 (1997) (1,792 water transportation workers).

The situation is similar in other West Coast states. In Oregon, for example, the state supreme court held in *Kinney v. General Construction Co.*, 248 Or. 500, 435 P.2d 297 (1967), that a deckhand on a tug moving a barge as part of a river dredging project was entitled to recover under the Jones Act. The lower courts have since consistently permitted brown-water seamen to recover under the Jones Act. *See, e.g., Gaussoin v. Port of Portland*, 144 Or. App. 247, 927 P.2d 601 (1996) (affirming recovery; injured employee was a deckhand on a tug in the Port of Portland – almost 100 miles upstream from the Pacific Ocean); *Watson v. Puget Sound Tug & Barge Co.*, 96 Or. App. 79, 771 P.2d 307 (1989) (affirming recovery; injured employee was a deckhand on tugboats and barges on the Columbia River), *rev. denied*, 308 Or. 315, 779 P.2d 618 (1989); *Veberes v. Knappton Corp.*, 92 Or. App. 378, 759 P.2d 279 (1988) (affirming recovery; injured employee was a deckhand on a Columbia River tugboat), *rev. denied*, 307 Or. 78, 763 P.2d 732 (1988). In Washington, the state supreme court has recognized a waitress on a Puget Sound ferry boat, *Gross v. Washington State Ferries*, 59 Wash.2d 241, 367 P.2d 600 (1961), and a fisherman working on a river and the bay at its mouth, *Pryal v. Mardesich*, 51 Wash.2d 663, 321 P.2d 269 (1958), as Jones Act seamen.

No state court has read *Papai* and *Latsis* to establish a "high seas" requirement. The continuing validity of the rule rejected by the Ninth Circuit is illustrated by the state court decisions since *Papai* and *Latsis* that have adhered to the well-established doctrine and upheld seaman status for brown-water seamen. *See, e.g., Coleman v. Robicheaux Airboats, supra; Wall v. Progressive Barge Line*, ___ So.2d ___, 1997 La. App. LEXIS 2670, 1997 WL 680790

(La. App., Oct. 29, 1997) (No. 97-CA-0665) (affirming the recovery of the captain of an inland harbor tug); *Maddox v. Omni Drilling Corp.*, 698 So.2d 1022, 1025-26 (La. App. 1997) (holding that a support boat driver on waterways in the Sabine National Wildlife Refuge is a seaman); *Markle v. Cement Transit Co.*, ___ N.E.2d ___, 1997 Ohio App. LEXIS 4252, 1997 WL 578940 (Ohio App., Sept. 18, 1997) (No. 70175) (reversing summary judgment for the employer; injured employee was a cook on a Great Lakes vessel); *Hill v. Workmen's Compensation Appeal Board*, 703 A.2d 74 (Pa. Commw. Ct. 1997) (holding that a deck hand on a restaurant cruise vessel operating on the waters of the Delaware River was covered by the Jones Act).

THE NINTH CIRCUIT'S DECISION WILL HAVE A SERIOUS IMPACT ON THE OVERWHELMING MAJORITY OF U.S. SEAMEN, ON THEIR EMPLOYERS, AND ON THE DEPARTMENT OF LABOR

It is important for this Court to address the Ninth Circuit's "high seas" requirement and resolve the conflicts discussed here immediately, for the decision below will have a serious impact on the overwhelming majority of U.S. seamen, on their employers, and on the Department of Labor.

The Impact on U.S. Seamen

The decision below creates grave uncertainties for American seamen. Injured seamen are entitled to sue their negligent employers under the Jones Act. Other

injured maritime workers generally have a workers' compensation remedy against their employers, without regard to fault, under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50. These two remedies are mutually exclusive. *See, e.g., Latsis, supra,* 515 U.S. at 355-56; *Gizoni, supra,* 502 U.S. at 88; *Wilander, supra,* 498 U.S. at 347; *Swanson, supra,* 328 U.S. at 7. Thus it is particularly important for the courts to provide clear guidance on seaman status, the requirement that distinguishes the two, lest " 'the perils of judicial review,' " *Latsis, supra,* 515 U.S. at 356 (quoting G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, § 6-1, at 272 (2d ed. 1975)), undermine the remedies that Congress has provided. For three decades, this Court left the task entirely to the lower courts, and the result was " 'a labyrinth.' " *Ibid.* (quoting *Johnson v. John F. Beasley Const. Co.,* 742 F.2d 1054, 1060 (CA7 1984), *cert. denied,* 469 U.S. 1211 (1985)). *Wilander* began the process of restoring order to the field, but the decision below shows that the task is not yet done. Taking language from *Latsis* and *Papai* out of context, the Ninth Circuit has reintroduced serious confusion.

The Ninth Circuit's high seas requirement has a particularly far-reaching impact, for today the overwhelming majority of U.S. seamen would not satisfy this requirement. Since the end of World War II, the number of "blue-water" seamen in the United States has steadily declined from almost 158,900 in 1945, *see* W. LOVETT (ed.), UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 159 (1996) (table 6.1), to 7,500 in 1992, *see* BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 660 tbl. 1075 (117th ed. 1997). In 1994,

however, the Bureau of Labor Statistics reported that there were about 48,000 "water transportation workers" – a category that includes seamen, deckhands, and marine oilers; captains and pilots; engineers; and mates and deck officers – on vessels plying the oceans, Great Lakes, harbors, rivers, canals, and other waterways.[13] *See* BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 1996-97 EDITION 458-59 (Bulletin 2470, Feb. 1996). Thus we can see that only about fifteen percent of the nation's seamen fit the Ninth Circuit's mold. Under the decision below, the remaining eighty-five percent would lose their Jones Act benefits – benefits that Congress intended them to have and benefits that the courts have traditionally awarded to them.

The Impact on Employers

The decision below similarly creates commercially unacceptable uncertainties for those who employ seamen. Just as it is important for employees to know the remedies available to them, it is important for employers to know their responsibilities so that they can obtain appropriate insurance. Under the decision below,

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[13] The Bureau of Labor Statistics recognizes that this is a low estimate because many seamen (particularly those who work on the Great Lakes) do not work year-round. *See* BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 1996-97 EDITION 458 (Bulletin 2470, Feb. 1996). Furthermore, the Bureau's cited category does not include many brown-water workers who would qualify as "seamen" outside of the Ninth Circuit. *See, e.g., id.* at 473 (11,000 "riggers" employed in 1994); *Gizoni, supra* (recognizing that a "rigging foreman" can qualify as "seaman").

employers that do business both on the West Coast and elsewhere in the country will need to arrange differing coverages for different workers depending on where the workers are assigned. The conflict between state and federal courts in some of the states of the Ninth Circuit, *see supra* at 15-17, will require employers in those states to arrange double coverage for brown-water seamen. These employers will be unable to predict which remedy a particular worker will successfully pursue until the worker files suit in state court (relying on the Jones Act) or demands LHWCA benefits (with potential judicial review in federal court). Because the Jones Act is more beneficial to injured employees in some contexts and the LHWCA in others, either option is a real possibility (depending on the facts of the case) and the employer must insure for both.

It is particularly important for employers to be able to predict whether any of their workers may be eligible for LHWCA benefits because the Act requires covered employers to "secure the payment of compensation," generally by obtaining insurance. *See* 33 U.S.C. § 932(a). Both the employer and senior corporate officers are subject to criminal penalties for violating this requirement. *See* 33 U.S.C. § 938(a); 20 C.F.R. § 703.003(a). Thus employers who rely on the traditional understanding of seaman status and fail to obtain LHWCA insurance coverage for their brown-water seamen employees risk serious fines; their senior corporate officers risk fines and imprisonment.

The Impact on the Department of Labor

The Secretary of Labor is responsible for administering LHWCA. *See* 33 U.S.C. § 939. The Secretary has delegated these responsibilities to the Director of the Office of Workers' Compensation Programs (OWCP), who administers the Act pursuant to regulations codified at 20 C.F.R. pts. 701-04. Because the Jones Act and LHWCA are mutually exclusive, the Ninth Circuit's decision severely restricting eligibility for Jones Act coverage will correspondingly expand eligibility for LHWCA coverage. According to the Maritime Administration, in fiscal year 1995 there were an average of just under 22,500 longshore workers and just under 49,000 shipyard production workers (most of whom would presumably qualify for LHWCA coverage). *See* MARITIME ADMINISTRATION, DEP'T OF TRANSPORTATION, ANNUAL REPORT 1995, table 19 (1996). If more than 40,000 brown-water seamen were added to these totals, the population with LHWCA coverage would increase by more than fifty percent. Thus if the decision below is allowed to stand, West Coast OWCP district offices can expect to see their workload increase by over fifty percent as thousands of additional cases are governed by LHWCA rather than the Jones Act.

The Department of Labor also has a strong interest in the proper administration of the statutory scheme that Congress has established to provide compensation for injured maritime workers. The Ninth Circuit's novel requirement would not only shift over 40,000 workers out of Jones Act coverage and into LHWCA coverage, it would put over 40,000 workers into coverage that Congress did not intend them to have. In administering the LHWCA, the Department is charged with giving effect to

Congress's intent. The decision below interferes with that mission.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT CABRAL, *Plaintiff-Appellant,* v. HEALY TIBBITS BUILDERS, INC., *Defendant-Appellee.*	No. 95-16476 D.C. No. CV-95-00126-SPK ORDER AMENDING OPINION AND DENYING THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior District Judge, Presiding

Argued and Submitted
December 9, 1996 – San Francisco, California

Filed July 8, 1997
Amended October 15, 1997

Before: Betty B. Fletcher, Charles Wiggins,
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Wiggins

COUNSEL

Christopher P. McKenzie, Honolulu, Hawaii, for the plaintiff-appellant.

Michael Formby, Alcantara & Frame, Honolulu, Hawaii, for the defendant-appellee.

ORDER

The opinion filed July 8, 1997, slip opinion number 7877 and appearing at 118 F.3d 1363, is amended as follows:

1. At slip op. 7881, line 27, replace "three" with "four".

2. At slip op. p. 7881, line 28, add footnote after "law.":

See McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356-7 (1991) (holding that one need not aid in the navigation of a vessel in order to qualify as a seaman under the Jones Act); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991) (holding that a ship repairman employed at a shipyard is not limited to a remedy under the LHWCA as a matter of law if genuine issues of fact exist as to whether the worker was also a seaman under the Jones Act due to an employment-related connection to a vessel in navigation); *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172, 2190-2192 (1995) (setting forth a two-prong test for seaman status designed to separate sea-based maritime workers from land-based employees); *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1541 (1997) (applying the

Latsis test and holding that a showing of common ownership or control is required when evaluating the plaintiff's employment-related connection to a vessel in navigation).

3. Page 7881, line 30, replace "second" with "third".

With these amendments, the panel has voted unanimously to deny the petition for rehearing and Judges Fletcher and T.G. Nelson vote to reject the suggestion for rehearing en banc and Judge Wiggins so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Defendant-appellee Healy Tibbitts Builders' motion to strike plaintiff's petition for rehearing is DENIED.

OPINION

WIGGINS, Circuit Judge:

Robert Cabral was injured while he was working as a crane operator aboard a crane barge on a construction project in Pearl Harbor. He sued his employer under the Jones Act. The district court granted summary judgment in favor of his employer on the ground that Cabral was not a "seaman" under the Jones Act. Cabral appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's judgment for the reasons set forth below.

BACKGROUND

From July 14, 1993 to May 31, 1994, Cabral was employed by Healy Tibbits Builders, Inc. ("Healy"). Cabral worked on a variety of land-based and sea-based projects during this period. From June 1, 1994 to August 14, 1994, Cabral did not work for Healy. On August 15, 1994, Healy hired Cabral to work as the crane operator for a Healy construction project at the Ford Island Ferry in Pearl Harbor. The project involved removing and replacing "mooring dolphins" at the ferry. A mooring dolphin is a timber pile driven into the bottom of the harbor that cushions the ferry during landing.

Cabral was assigned to operate the crane aboard Barge 538. Between August 15, 1994 and the date of the accident, Cabral spent approximately ninety percent of his work time aboard Barge 538 operating the vessel's crane. Barge 538 is approximately 160 feet long and 50 feet wide. It has a raked bow and stern, drawing about five feet of water at the stern and four at the bow. Although the barge is not self-propelled, it can be moved up to 500 feet by manipulating its anchor lines. The United States Coast Guard inspects Barge 538 annually to ensure seaworthiness and compliance with safety standards. The barge has been used on various construction projects throughout the Honolulu area and as far away as the Philippines. Although Barge 538 can serve other purposes, it is primarily a crane barge. To serve that primary purpose, it has a 360-degree, 125 foot crane permanently welded to its deck.

On the weekend of September 24 and 25, 1994, Barge 538 was temporarily relocated to another part of the

harbor to take soil samples. This soil sampling project did not require the use of the barge's crane, so Cabral was not aboard. The barge was returned to the Ford Island project on the afternoon of the 25th. When Cabral reported for work on the morning of Monday, September 26, 1994, he slipped and fell on the barge's gangway, suffering an injury to his lower back. He brought this action under the Jones Act against Healy.

The district court granted summary judgment in Healy's favor, holding that Cabral was not entitled to "seaman" status because his connection with Barge 538 "was at best transitory." Accordingly, the district court entered judgment in favor of Healy on Cabral's complaint.

DISCUSSION

We review *de novo* the district court's order granting summary judgment in favor of Healy. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996). We must determine, viewing the evidence in the light most favorable to Cabral, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* Whether Cabral was a seaman when he slipped and fell on Barge 538's gangway is a mixed question of law and fact. *Boy Scouts of Am. v. Graham*, 86 F.3d 861, 864 (9th Cir. 1996). Nevertheless, summary judgment is mandated where the facts and the law will reasonably support only one conclusion regarding Cabral's seaman status. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991).

The Jones Act provides a cause of action to any "seaman" who suffers personal injuries in the course of his employment. *See* 46 U.S.C. app. § 688. Unfortunately, what seems a fairly simple inquiry – whether a particular employee is a "seaman" for purposes of the Jones Act – has been anything but for the various federal courts which have grappled with the issue, including our own. With the Supreme Court's recent decision in *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), the Jones Act "seaman" inquiry has reached our nation's highest court four times already this decade, a remarkable record for any area of the law.[1]

We begin our attempt to navigate the perils of the "seaman" inquiry with the third of these cases, *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172 (1995) ("*Latsis*"). There, the Supreme Court formulated a two-part test for determining whether an employee should be treated as a "seaman" under the Jones Act:

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[1] *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356-57 (1991) (holding that one need not aid in the navigation of a vessel in order to qualify as a seaman under the Jones Act); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991) (holding that a ship repairman employed at a shipyard is not limited to a remedy under the LHWCA as a matter of law if genuine issues of fact exist as to whether the worker was also a seaman under the Jones Act due to an employment-related connection to a vessel in navigation); *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172, 2190-2192 (1995) (setting forth a two-prong test for seaman status designed to separate sea-based maritime workers from land-based employees); *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1541 (1997) (applying the *Latsis* test and holding that a showing of common ownership or control is required when evaluating the plaintiff's employment-related connection to a vessel in navigation).

> [T]he essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' " . . . Second, . . . a seaman must have a *connection* to a vessel in navigation (or to an identifiable group of such vessels) that is *substantial* in terms of both its duration and its nature.

Latsis, 115 S. Ct. at 2190 (quoting *Wilander*, 498 U.S. at 355) (emphases added). The Court explained that the latter requirement was designed to separate sea-based maritime workers from land-based employees "who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.*

Healy does not dispute that Cabral meets the first part of this test; Cabral's duties as a crane operator unquestionably contribute to Barge 538's function as a crane barge. We turn, then, to the second part of the *Latsis* test, and consider whether Cabral had a connection that was substantial in terms of duration and nature to a vessel in navigation.

Assuming that Barge 538 was a vessel in navigation, the district court concluded that Cabral's connection with Barge 538 was not substantial in terms of duration and nature. The district court emphasized that Cabral's assignment to Barge 538 was temporary, noting that the barge was simply a platform upon which he happened to be performing his work as a crane operator. As a result, the district court granted summary judgment in Healy's favor.

In *Papai*, the Supreme Court had to decide whether summary judgment should be granted against a Jones Act plaintiff who had been hired to perform a one-day painting job aboard the defendant's tugboat. John Papai was hired out of a union hiring hall by the owner of the *Point Barrow* to do a one-day painting job on the tug's housing structure. While he was painting, he injured his knee when he fell from a ladder. Papai had worked for the *Point Barrow*'s owner on twelve previous occasions in the two-and-a-half months before his injury. The district court granted summary judgment in favor of the tugboat's owner, concluding that Papai was not a seaman within the meaning of the Jones Act.

A divided panel of our court reversed. The panel majority held that the relevant inquiry was "not whether plaintiff had a permanent connection with the vessel [but] whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 206 (9th Cir. 1995). The panel majority concluded that the group of employers who hired workers out of the union hall could be considered a common employer for purposes of determining a worker's seaman status. As a result, the panel majority held that "all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time period should be considered in making the determination." *Id.* The panel majority then concluded that there were triable issues of fact as to whether the plaintiff had a

substantial connection with the vessels upon which he worked. *Id.*

The Supreme Court granted certiorari and reversed. Most of the Court's discussion focused on whether our majority decision properly allowed Papai to rely on work done for other employers; adopting the view of the dissent, the Court held that we misapplied *Latsis* by not requiring a showing of common ownership or control. *Papai*, 117 S. Ct. at 1541. However, as part of this discussion, the Court applied the two-part *Latsis* test to Papai's work aboard the *Point Barrow* and concluded that no reasonable jury could conclude that Papai was a seaman as a matter of law. The Court commented thusly on the "substantial connection" inquiry:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Id. at 1540. Then, a few paragraphs later, after noting that Papai's work on the *Point Barrow* was not of a seagoing nature, the Court concluded that Papai's assignment to the *Point Barrow* on the day of the injury "was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that . . . . does not qualify one for seaman status." *Id.* at 1542 (quoting *Latsis*, 115 S. Ct. at 2190).

For our present purposes, *Papai* and *Latsis* dictate that when we determine whether the nature of Cabral's

connection to Barge 538 is substantial, we should focus on whether Cabral's duties were primarily sea-based activities. In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks. *See Papai*, 117 S. Ct. at 1540 ("[T]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."); *Latsis*, 115 S. Ct. at 2190 ("[T]he Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' " (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting))).

We conclude that the undisputed evidence shows that Cabral was a land-based worker who had only a transitory or sporadic connection with Barge 538. Cabral was hired to work on Barge 538 as a crane operator and not as a crew member. Cabral presents no evidence showing that he was ever aboard Barge 538 when it was anywhere but the Ford Island Ferry project. In fact, when the barge was used in another part of the harbor on a soil sampling project on the weekend immediately preceding the accident, Cabral was not aboard because the barge's crane was not used. Furthermore, Cabral presents no evidence showing that he would continue to work aboard Barge 538 after the Ford Island Ferry project was completed. All of the evidence points to one conclusion: that Cabral was a land-based crane operator who happened to be assigned to a project which required him to work

aboard Barge 538. In sum, we hold that the district court correctly concluded that there was no evidence from which a reasonable jury could infer that Cabral met the substantial connection test. As a result, we affirm the district court's judgment in favor of Healy.[2]

AFFIRMED.

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[2] Our conclusion that Cabral did not have a substantial connection with Barge 538 means we need not reach the issue of whether Barge 538 was a vessel in navigation. Thus, we express no opinion on this issue.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT CABRAL, *Plaintiff-Appellant,* v. HEALY TIBBITS BUILDERS, INC., *Defendant-Appellee.*	No. 95-16476 D.C. No. CV-95-00126-SPK OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior District Judge, Presiding

Argued and Submitted
December 9, 1996 – San Francisco, California

Filed July 8, 1997

Before: Betty B. Fletcher, Charles Wiggins,
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Wiggins

COUNSEL

Christopher P. McKenzie, Honolulu, Hawaii, for the plaintiff-appellant.

Michael Formby, Alcantara & Frame, Honolulu, Hawaii, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Robert Cabral was injured while he was working as a crane operator aboard a crane barge on a construction project in Pearl Harbor. He sued his employer under the Jones Act. The district court granted summary judgment in favor of his employer on the ground that Cabral was not a "seaman" under the Jones Act. Cabral appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's judgment for the reasons set forth below.

BACKGROUND

From July 14, 1993 to May 31, 1994, Cabral was employed by Healy Tibbits Builders, Inc. ("Healy"). Cabral worked on a variety of land-based and sea-based projects during this period. From June 1, 1994 to August 14, 1994, Cabral did not work for Healy. On August 15, 1994, Healy hired Cabral to work as the crane operator for a Healy construction project at the Ford Island Ferry in Pearl Harbor. The project involved removing and replacing "mooring dolphins" at the ferry. A mooring dolphin is a timber pile driven into the bottom of the harbor that cushions the ferry during landing.

Cabral was assigned to operate the crane aboard Barge 538. Between August 15, 1994 and the date of the accident, Cabral spent approximately ninety percent of his work time aboard Barge 538 operating the vessel's crane. Barge 538 is approximately 160 feet long and 50 feet wide. It has a raked bow and stern, drawing about five feet of water at the stern and four at the bow.

Although the barge is not self-propelled, it can be moved up to 500 feet by manipulating its anchor lines. The United States Coast Guard inspects Barge 538 annually to ensure seaworthiness and compliance with safety standards. The barge has been used on various construction projects throughout the Honolulu area and as far away as the Philippines. Although Barge 538 can serve other purposes, it is primarily a crane barge. To serve that primary purpose, it has a 360-degree, 125 foot crane permanently welded to its deck.

On the weekend of September 24 and 25, 1994, Barge 538 was temporarily relocated to another part of the harbor to take soil samples. This soil sampling project did not require the use of the barge's crane, so Cabral was not aboard. The barge was returned to the Ford Island project on the afternoon of the 25th. When Cabral reported for work on the morning of Monday, September 26, 1994, he slipped and fell on the barge's gangway, suffering an injury to his lower back. He brought this action under the Jones Act against Healy.

The district court granted summary judgment in Healy's favor, holding that Cabral was not entitled to "seaman" status because his connection with Barge 538 "was at best transitory." Accordingly, the district court entered judgment in favor of Healy on Cabral's complaint.

DISCUSSION

We review *de novo* the district court's order granting summary judgment in favor of Healy. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116

S. Ct. 1261 (1996). We must determine, viewing the evidence in the light most favorable to Cabral, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* Whether Cabral was a seaman when he slipped and fell on Barge 538's gangway is a mixed question of law and fact. *Boy Scouts of Am. v. Graham*, 86 F.3d 861, 864 (9th Cir. 1996). Nevertheless, summary judgment is mandated where the facts and the law will reasonably support only one conclusion regarding Cabral's seaman status. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991).

The Jones Act provides a cause of action to any "seaman" who suffers personal injuries in the course of his employment. *See* 46 U.S.C. app. § 688. Unfortunately, what seems a fairly simple inquiry – whether a particular employee is a "seaman" for purposes of the Jones Act – has been anything but for the various federal courts which have grappled with the issue, including our own. With the Supreme Court's recent decision in *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), the Jones Act "seaman" inquiry has reached our nation's highest court three times already this decade, a remarkable record for any area of the law.

We begin our attempt to navigate the perils of the "seaman" inquiry with the second of these cases, *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172 (1995) (*"Latsis"*). There, the Supreme Court formulated a two-part test for determining whether an employee should be treated as a "seaman" under the Jones Act:

> [T]he essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' " . . . Second, . . . a seaman must have a *connection* to a vessel in navigation (or to an identifiable group of such vessels) that is *substantial* in terms of both its duration and its nature.

Latsis, 115 S. Ct. at 2190 (quoting *Wilander*, 498 U.S. at 355) (emphases added). The Court explained that the latter requirement was designed to separate sea-based maritime workers from land-based employees "who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.*

Healy does not dispute that Cabral meets the first part of this test; Cabral's duties as a crane operator unquestionably contribute to Barge 538's function as a crane barge. We turn, then, to the second part of the *Latsis* test, and consider whether Cabral had a connection that was substantial in terms of duration and nature to a vessel in navigation.

Assuming that Barge 538 was a vessel in navigation, the district court concluded that Cabral's connection with Barge 538 was not substantial in terms of duration and nature. The district court emphasized that Cabral's assignment to Barge 538 was temporary, noting that the barge was simply a platform upon which he happened to be performing his work as a crane operator. As a result, the district court granted summary judgment in Healy's favor.

In *Papai,* the Supreme Court had to decide whether summary judgment should be granted against a Jones Act plaintiff who had been hired to perform a one-day painting job aboard the defendant's tugboat. John Papai was hired out of a union hiring hall by the owner of the *Point Barrow* to do a one-day painting job on the tug's housing structure. While he was painting, he injured his knee when he fell from a ladder. Papai had worked for the *Point Barrow* 's owner on twelve previous occasions in the two-and-a-half months before his injury. The district court granted summary judgment in favor of the tugboat's owner, concluding that Papai was not a seaman within the meaning of the Jones Act.

A divided panel of our court reversed. The panel majority held that the relevant inquiry was "not whether plaintiff had a permanent connection with the vessel [but] whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 206 (9th Cir. 1995). The panel majority concluded that the group of employers who hired workers out of the union hall could be considered a common employer for purposes of determining a worker's seaman status. As a result, the panel majority held that "all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time period should be considered in making the determination." *Id.* The panel majority then concluded that there were triable issues of fact as to whether the plaintiff had a

substantial connection with the vessels upon which he worked. *Id.*

The Supreme Court granted certiorari and reversed. Most of the Court's discussion focused on whether our majority decision properly allowed Papai to rely on work done for other employers; adopting the view of the dissent, the Court held that we misapplied *Latsis* by not requiring a showing of common ownership or control. *Papai*, 117 S. Ct. at 1541. However, as part of this discussion, the Court applied the two-part *Latsis* test to Papai's work aboard the *Point Barrow* and concluded that no reasonable jury could conclude that Papai was a seaman as a matter of law. The Court commented thusly on the "substantial connection" inquiry:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Id. at 1540. Then, a few paragraphs later, after noting that Papai's work on the *Point Barrow* was not of a seagoing nature, the Court concluded that Papai's assignment to the *Point Barrow* on the day of the injury "was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that . . . . does not qualify one for seaman status." *Id.* at 1542 (quoting *Latsis*, 115 S. Ct. at 2190).

For our present purposes, *Papai* and *Latsis* dictate that when we determine whether the nature of Cabral's

connection to Barge 538 is substantial, we should focus on whether Cabral's duties were primarily sea-based activities. In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks. *See Papai*, 117 S. Ct. at 1540 ("[T]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."); *Latsis*, 115 S. Ct. at 2190 ("[T]he Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' " (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting))).

We conclude that the undisputed evidence shows that Cabral was a land-based worker who had only a transitory or sporadic connection with Barge 538. Cabral was hired to work on Barge 538 as a crane operator and not as a crew member. Cabral presents no evidence showing that he was ever aboard Barge 538 when it was anywhere but the Ford Island Ferry project. In fact, when the barge was used in another part of the harbor on a soil sampling project on the weekend immediately preceding the accident, Cabral was not aboard because the barge's crane was not used. Furthermore, Cabral presents no evidence showing that he would continue to work aboard Barge 538 after the Ford Island Ferry project was completed. All of the evidence points to one conclusion: that Cabral was a land-based crane operator who happened to be assigned to a project which required him to work

aboard Barge 538. In sum, we hold that the district court correctly concluded that there was no evidence from which a reasonable jury could infer that Cabral met the substantial connection test. As a result, we affirm the district court's judgment in favor of Healy.[1]

AFFIRMED.

---

[1] Our conclusion that Cabral did not have a substantial connection with Barge 538 means we need not reach the issue of whether Barge 538 was a vessel in navigation. Thus, we express no opinion on this issue.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT A. CABRAL, Plaintiff, vs. HEALY TIBBITS BUILDERS, INC.; and JOHN DOES 1-10, Defendants.	) CIVIL NO. 95-00126 SPK)) ORDER DENYING) PLAINTIFF'S MOTION) FOR SUMMARY) JUDGMENT AND) GRANTING) DEFENDANT'S CROSS) MOTION FOR) SUMMARY JUDGMENT)) (Filed Jun. 19, 1995)

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

I. OVERVIEW

Plaintiff Robert A. Cabral ("Cabral"), who was allegedly injured when he slipped and fell on a barge being used as a platform for a crane in Pearl Harbor, seeks summary judgment as to his asserted status as a "seaman" under the Jones Act and general maritime law and his entitlement to maintenance and cure. Defendant Healy Tibbits Builders, Inc. ("Healy") has brought a cross motion for summary judgment, seeking a ruling by this

court that Plaintiff is not a "seaman" and thus not entitled to recover maintenance and cure under general maritime law, damages for unseaworthiness, or damages for negligence under the Jones Act.

II. BACKGROUND

Cabral was injured on September 26, 1994 while working for Healy as a crane operator on Barge 538. The project Cabral was working on at the time involved the removal and reinstallation of "mooring dolphins" for the Ford Island ferry at Pearl Harbor. The dolphins are made up of timber piles driven into the bottom of the harbor. Cabral apparently began working on the project on August 15, 1994, a little less than a month and a half before he was injured. Plaintiff and Defendant disagree as to what percentage of Cabral's work time was spent on Barge 538. They also disagree as to whether Cabral worked on any other vessels.[1]

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[1] Plaintiff cites to the deposition of one Richard Heltzel, presumably a Healy company official, who testified that Cabral did "most," or about 90 percent of his work on Barge 538, though he might have done a few hours of work on shore. Defendant cites to an "employment chronology" for Cabral, presumably produced by Healy, showing that he worked for the company from July 1993 to October 1994 and that his assignments involved operating cranes "onshore," "on beach," at "Kahe Power Plant, Oahu," at "Kal Hwy, Hawaii Kai, Oahu," at "Hickam Dormitory," and at "Hickam AFB," and that such assignments constituted significantly more than 10 percent of his total work time. It appears that Plaintiff is considering only the period after August 15, 1994, when Cabral began working on the Ford Island project. Defendant, on the other hand, seeks to direct the court's attention to a longer period over which

Barge 538, which is owned by Defendant Healy, is 160 feet long and 50 feet wide. It draws about five feet of water at the stern and four feet at the bow. The bow and stern are raked. The barge's name is printed on the stern and on the sides. "New York," the name of the barge's hailing port, is painted on the stern. The barge is not self-propelled, but must be towed from place to place. Once anchored, the barge can move a limited distance fore and aft by manipulation of bow and stern lines using a winch. The United States Coast Guard inspects Barge 538 once a year for seaworthiness and compliance with various safety regulations. The barge has seen service in construction projects in Manila Bay in the Philippines and in Nawiliwili Harbor on Kauai as well as in Pearl Harbor.

Mounted atop the barge is a 360-degree crane with a 125-foot boom. The frame of the crane is permanently welded to the deck of the barge. The barge also contains a 20-foot-long shipping container for small tool storage, and a desk. There is also a generator to power lights for nighttime work.

On September 24, 1994, two days before Cabral was injured, Barge 538 was temporarily relocated to another area of the harbor for use by a company doing test borings on the harbor bottom. The test boring job was completed on the afternoon of September 25, 1994 and the barge was returned to the Ford Island worksite.

Cabral alleges that he was injured on the morning of September 26, 1994 when he slipped and fell on mud that

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Cabral worked for Defendant in a variety of assignments, some land-based and some on the water.

had accumulated on the barge during the test boring operation. He sued, seeking recovery for negligence under the Jones Act, for unseaworthiness, and for maintenance and cure.

III. DISCUSSION

A. Whether Cabral was a "Seaman."

The Ninth Circuit has adhered to a three-part test for determining whether a worker is a "seaman" for purposes of the Jones Act and general maritime law:

> (1) the vessel on which the claimant was employed must be in navigation;
>
> (2) the claimant must have a more or less permanent connection with the vessel; and
>
> (3) the claimant must be aboard primarily to aid in navigation.

McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567, 569 (9th Cir. 1992) (*citing Estate of Wenzel v. Seaward Marine Servs., Inc.* 709 F.2d 1326, 1327 (9th Cir. 1983)).

The United States Supreme Court rejected the third prong of this test in *McDermott International, Inc. v. Wilander*, 498 U.S. 336 (1991), holding that to be a "seaman" one need only be "doing the ship's work," and need not be directly engaged in the navigation of a vessel. The Plaintiff in *Wilander* was a paint foreman injured while assigned to a paint boat chartered by the defendant. Accordingly, the fact that Cabral was a crane operator,

and not at all engaged in propelling, steering or otherwise "navigating" Barge 538, is not dispositive. If a painting foreman aboard a paint boat can be said to be doing "the ship's work," the same can probably be said about a crane operator aboard a crane barge.

Assuming that Cabral was doing the work of Barge 538 within the meaning of *Wilander,* two questions remain: (1) Was Barge 538 a "vessel in navigation?" (2) Did Cabral have a "more or less permanent" connection with the barge? (The Supreme Court recently further refined the seaman test in *Chandris, Inc. v. Latsis,* 1995 WL 352858 (U.S. June 14, 1995), holding that "the duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime worker is a seaman[.]")

1. Whether Barge 538 was a Vessel in Navigation.

To answer the first question, Plaintiff relies primarily on *Wenzel v. Seaward Marine Services,* 709 F.2d 1326 (9th Cir. 1983), in which the Ninth Circuit reversed this court's grant of summary judgment in a case involving a submerged cleaning and maintenance platform known as a "SCAMP." Plaintiff Wenzel was killed while cleaning the sea chest of a Navy ship. Seaward Marine used the SCAMP, an unmanned saucer-shaped vehicle that traveled along the hull of a ship, in its cleaning operations. Wenzel's estate argued that the SCAMP was a "vessel in navigation" and that Wenzel was a seaman employed to aid in the navigation of the SCAMP.

In holding that summary judgment in favor of Seaward was inappropriate, the Ninth Circuit noted that various special purpose craft, "far different from traditional seafaring ships," have been held by courts to be vessels. *Id.* at 1328. The appellate court concluded that Wenzel's status as a seaman and whether the SCAMP was a vessel were close questions of fact precluding summary judgment. *Id.*

Healy does not attempt to distinguish *Wenzel*, but instead relies on *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 87 (1992), in which the First Circuit held that a Carpenter's Union member who slipped and fell while assigned to work on a barge being used as a platform for a construction crane was not a "seaman" within the meaning of the Jones Act. The First Circuit noted the Supreme Court's observation in *Wilander* that the Jones Act was intended to recognize that seamen who go down to sea in ships incur special hazards not incurred at dockside. Accordingly, the appeals court held that "if a barge or other float's purpose or primary business is *not* navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit." *Id.* at 1123.

Healy contends that the holding in *DiGiovanni* "has quickly become the standard for other courts," *citing, e.g., Sala v. Gates Constr. Corp.*, 868 F.Supp. 474 (E.D.N.Y. 1994); *Taylor v. Cooper River Constructors*, 830 F.Supp. 300 (D.S.C. 1993). Healy further argues that Barge 538's primary purpose or business was not navigation or commerce, i.e., the transport of goods or people over navigable waterways. Moreover, Barge 538 was not in actual navigation

or transit at the time Cabral was injured. Thus, according to Healy, Cabral does not meet the test for seaman status laid out in *DiGiovanni*.

The Ninth Circuit cited *DiGiovanni* with apparent approval in *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992), paying particular attention to the First Circuit's "primary purpose or business" test. *Kathriner*, however, involved a floating fish processing plant built inside the gutted hull of an old liberty ship and permanently anchored and docked at its port in Alaska. The Ninth Circuit had little trouble finding that a worker in the fish processing plant was not a "seaman" for Jones Act purposes. The *Kathriner* court did not overrule *Wenzel*, but instead distinguished the case by noting that although neither the SCAMP nor the fish processing factory in *UNISEA* could navigate the high seas,

> the SCAMP is still an independent mechanism that is designed to perform its function in the water. The UNISEA, however, is designed as a floating factory – merely extending land over water for the purpose of increasing the usable space of a dockside fish processing operation.

Kathriner, 975 F.2d at 660.

It would seem that the answer to the question of whether Barge 538 is a vessel in navigation depends on whether the barge is more like the UNISEA, i.e., "merely extending land over water," or the SCAMP, an "independent mechanism" performing its function on the water. On balance, it appears Barge 538 has more in common with the SCAMP than the UNISEA. It is undisputed that the barge has crossed the high seas for use in construction projects on Kauai and in the Philippines. Such

mobility certainly distinguishes Barge 538 from the UNI-SEA, making it more than a simple extension of a land-based work area.

Assuming without deciding that Barge 538 is a vessel in navigation for purposes of the instant case, however, a question remains as to whether Cabral had the requisite employment-related connection to the barge at the time of his accident. The court finds that he did not.

2. Whether Cabral had a More or Less Permanent Connection with the Vessel.

As already noted, Cabral contends he spent more than 90 percent of his working time on Barge 538 and thus owed his "allegiance" to the barge. Healy, on the other hand, notes that Cabral's assignment on Barge 538 was only one of numerous jobs he performed for Healy over a period of about a year and a half as a crane operator and member of the Operating Engineers Union.[2] Healy argues that far from being a member of any ship's crew, Cabral was a land-based employee assigned to operate cranes on land and water.

Cabral's focus on the brief period during which he worked for Healy on Barge 538 – as opposed to his overall employment as a crane operator – tends to produce a distorted picture of his work. He was, first and foremost, a crane operator. Much, if not most, of his

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[2] As a member of the union, Cabral apparently worked for Healy and other contractors on specific assignments. He was not a permanent employee of Healy, but was available for hire to Healy and other contractors as work came up.

work, excluding the period during which he was assigned to Barge 538, was done on land. His assignment to Barge 538 was temporary; it would end when the work on the mooring dolphins was complete. There is no indication in the record that Cabral owed a crew member's "allegiance" to Barge 538. Rather, the barge was simply a platform upon which he happened to be performing his work as a crane operator.

As the United States Supreme Court recently noted, the reason for requiring a "substantive connection" between a worker seeking seaman status and his or her purported vessel is "to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Chandris*, 1995 WL 352858, at *10.

Cabral's connection with Barge 538 was at best transitory. Moreover, his work on a crane mounted atop a barge moored in a sheltered harbor is hardly the sort of employment that would regularly expose him to "the perils of the sea." The court finds that Cabral is not a seaman for purposes of the Jones Act and general maritime law. Accordingly, he is not entitled to recover in negligence under the Jones Act, or for unseaworthiness or maintenance and cure under general maritime law.

IV. CONCLUSION

Plaintiff's motion for summary judgment is DENIED. Defendant's cross motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 19, 1995.

/s/ Samuel P. King
SAMUEL P. KING
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT A. CABRAL, Plaintiff, vs. HEALY TIBBITS BUILDERS, INC.; and JOHN DOES 1-10, Defendants.	) CIVIL NO. 95-00126 SPK)) ORDER DENYING) PLAINTIFF'S MOTION) FOR) RECONSIDERATION OF) ORDER DATED JUNE) 19, 1995 DENYING) PLAINTIFF'S MOTION) FOR SUMMARY) JUDGMENT AND) GRANTING) DEFENDANT'S CROSS) MOTION FOR) SUMMARY JUDGMENT)) (Filed Jul. 20, 1995)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DATED JUNE 19, 1995 DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

The court has reviewed Plaintiff's motion for reconsideration and Defendant's opposition thereto, together with the accompanying exhibits. The court finds that Plaintiff has demonstrated neither (1) the discovery of new material facts not previously available, (2) an intervening change in law, nor (3) manifest error of law or fact in the court's June 19, 1995 order. Accordingly, Plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 20, 1995.

/s/ Samuel P. King
SAMUEL P. KING
United States District Judge

FILED
APR 10 1998
OFFICE OF THE CLERK

No. 97-1346

In The

Supreme Court of the United States

October Term, 1997

ROBERT CABRAL,

Petitioner,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

To qualify for coverage under the Jones Act, 46 U.S.C. App. § 688(a), "a seaman must have a connection to a vessel . . . that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Must an injured employee work on the high seas (as opposed to the navigable waters of an ocean harbor) to satisfy this requirement?

PARTIES TO THE PROCEEDING AND DISCLOSURE UNDER SUP.CT.R. 29.6

The petition accurately lists the parties to the proceeding.

Respondent Healy Tibbitts Builders, Inc., a corporate defendant, is an affiliated company of Weeks Marine, Inc. Both corporations are privately held. There is no public parent corporation or nonwholly owned subsidiary of Respondent Healy Tibbitts Builders, Inc.

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STATEMENT OF THE CASE

This case concerns the legal status of an injured maritime employee who claims mutually exclusive remedies against his employer. Under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, an injured maritime worker, other than "a master or member of a crew of any vessel," is entitled to wage compensation and medical benefits regardless of fault. 33 U.S.C. § 902(3); 33 U.S.C. § 905(a); 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW (2d ed. 1994), § 7-1, pp. 371-2. The Jones Act, 46 U.S.C. App. § 688(a), passed in 1920, provides a cause of action in negligence to any "seaman" injured in the course of employment. These two statutory remedies, the LHWCA and the Jones Act, are admittedly mutually exclusive. *See, e.g., Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-56 (1995); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 88 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946).

Petitioner was initially hired by respondent out of the union hall to operate a crane on-land on Kauai on July 14, 1993. *See* R.11, 72-73.[1]

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[1] Citations to Plaintiff-Appellant Robert A. Cabral's Excerpts of Record in the Ninth Circuit are cited with "R." and the page number. Citations to Defendant-Appellee Healy Tibbitts Builders, Inc.'s Excerpts of Record in the Ninth Circuit are cited with "SR." and the page number.

From July 14, 1993 through May 31, 1994, petitioner worked various jobs for respondent, all as a crane operator, some on barges, some on land, including the operation of cranes in respondent's yard.[2] *See* R.11.

Beginning June 1994 through August 14, 1994, respondent had no work for petitioner. On August 8, 1994, respondent commenced a job which required the removal and reinstallation of mooring dolphins for the Ford Island Ferry in Pearl Harbor. *See* R.74, 76, 12. The crane operator initially assigned by respondent to operate the crane on Barge 538 on the Ford Island job was reassigned to another job and petitioner was hired back on August 15, 1994 to operate the crane. *See* R.74. Petitioner was not assigned to Barge 538. He was hired and assigned to the job as a crane operator. *See* R.75, SR.36-37.

Barge 538 was located in Pearl Harbor within catwalk distance from land and between mooring dolphins on the port and starboard side of the barge. *See* R.3-6. Barge 538 was secured to the land by stern lines. *See* R.83. Bow lines ran to anchors. *See* R.82.

Since the barge was not equipped with bathroom, dining or sleeping facilities, petitioner boarded and

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[2] In his Opening Brief to the Ninth Circuit, petitioner calculated his time spent operating cranes on vessels for respondent at between 30% and 36%. *See* Petitioner's Opening Brief, p.16 n.1. Respondent notes that in his Petition for Writ of Certiorari, petitioner suggests that the period of employment considered by the district court was incorrect. *See* Petition for Writ of Certiorari, p.7 n.7. However, this issue is not on appeal and the record herein evidence a more enduring period of employment with respondent from 7/14/93 through 10/27/94.

disembarked the vessel via a catwalk to the shore on every occasion that he worked as a crane operator. Petitioner was not responsible for operating or maintaining the barge. *See* SR.36-37. This Court will find, as did the district court and the Ninth Circuit Court of Appeals, that there is absolutely no evidence in the record petitioner was hired or functioned as a crewmember or deckhand for respondent. The record contains no evidence petitioner handled lines, maintained the barge, prepared the barge for movement or ever sailed the seas, including those of Pearl Harbor, while employed by respondent.

In fact, during petitioner's operation of the crane on Barge 538 on the Ford Island job, it never moved from its moored location immediately adjacent to the shore. *See* R.90. However, on September 24, 1994, while the Ford Island job was still in progress, Barge 538 was relocated across Pearl Harbor to Wharf Y2 on a completely different drilling job. *See* R.64. The drilling job involved the taking of soil samples off Wharf Y2. Respondent's personnel assisted in loading the drill onto Barge 538 and in moving the barge across Pearl Harbor. *See* R.64-65, 9-10.[3]

However, since Petitioner was not assigned to the barge as a crewmember or deckhand, he was not involved with the movement of the barge across the

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[3] The Daily Time Sheets for 9/24/94 and 9/25/94 at R.9-10 contain the name "Cabral R.E." and are signed by "R. Cabral" beneath the remarks section containing notes regarding the movement of Barge 538 and the drilling operation. "R. Cabral" and "Cabral R.E." contained on the daily time sheets at R.9-10 are the initials of a relative of Plaintiff-Appellant, Ricky Cabral, *not* the petitioner herein.

harbor. *See* R.65-66, 75, SR.36-37. On the morning of September 26, 1994, after Barge 538 had been repositioned for the Ford Island job, petitioner was allegedly injured while stepping from the catwalk to the barge. *See* R.3-6. On November 4, 1994, petitioner filed a written claim for benefits against respondent under the LHWCA. *See* SR.32. On February 2, 1995, petitioner filed suit under the Jones Act. Petitioner did not request a jury trial. *See* R.103.

On May 4, 1995, petitioner filed a motion for summary judgment claiming seaman status as a matter of law. *See* R.103. On May 23, 1995, respondent filed a cross-motion for summary judgment seeking the denial of seaman status as a matter of law. *See* R.104.

In reaching its decision, the district court focused on the specific facts surrounding petitioner's employment, facts which were not in dispute inasmuch as both parties filed motions for summary judgment on the same issue and facts, albeit opposite sides of the same issue. Based on Barge 538's physical characteristics and prior maritime use, the district court assumed without deciding that Barge 538 was a vessel in navigation. *See* App. C, Petition for Writ of Certiorari, at 27a-28a. Moving on to the nature of petitioner's connection to the vessel, the district court once again focused on the unique facts of the case, as well as the precedent set forth by the Supreme Court in *Latsis*, to decide as a matter of law that petitioner did not owe "allegiance" to Barge 538, that his connection to the barge was "transitory" relative to his complete employment history with respondent, and that petitioner was not regularly exposed to the 'perils of the sea.' " *Id.* at 28a-30a.

On appeal by petitioner, the Ninth Circuit affirmed[4] without reaching the "vessel" issue. *See* App. A, Petition for Writ of Certiorari, at 11a. In reviewing *de novo* the undisputed evidence presented to the district court, the Ninth Circuit concluded that petitioner had presented "no evidence from which a reasonable jury could infer that Cabral met the substantial connection test." *Id.* at 10a-11a. In reaching their decision, the Ninth Circuit specifically noted that "[a]ll of the evidence points to one conclusion: that Cabral was a land-based crane operator who happened to be assigned to a project which required him to work aboard Barge 538." *Id.*

Although the Ninth Circuit quoted the Supreme Court's language and findings in both *Latsis* and *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535 (1997), *see* App. A, Petition for Writ of Certiorari, at 6a-10a, nowhere in its decision did the Ninth Circuit state or imply that petitioner was denied seaman status because he failed to work on the "high seas" or "open seas."

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[4] As pointed out by petitioner in his Petition for Writ of Certiorari, the Ninth Circuit issued an order affirming the district court on July 8, 1997 and subsequently amended its order affirming the district court on October 15, 1997, both of which contain the same operative findings. *See* App. A and B, Petition for Writ of Certiorari. Respondent's Opposition Brief will cite to the Ninth Circuit's amended order, Appendix A to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

THE QUESTION PRESENTED IS HYPOTHETICAL AND WAS NOT DETERMINATIVE TO THE NINTH CIRCUIT'S DECISION

Petitioner's primary argument for certiorari is based upon an overly expansive and broad reading of the Ninth Circuit's decision. Petitioner builds all of his arguments for certiorari from an initial premise that the Ninth Circuit held petitioner was not a seaman based upon his failure to work on the "high seas" or "open seas." Petitioner's foundational premise, however, is flawed and, on that basis alone, the Petition for Writ of Certiorari should be denied.

Petitioner cannot cite to a page in the Ninth Circuit decision where the "high seas" or "open seas" were discussed, much less distinguished from petitioner's work on Barge 538 within the confined waters of Pearl Harbor. The phrases "high seas" and "open seas" do not exist in the Ninth Circuit's decision, nor were they operative to the court's decision process below. In fact, the Petition for Writ of Certiorari cites more frequently to the Supreme Court's language in *Latsis* and *Papai* as the foundation for its premise than the Ninth Circuit's written decision in this case. Taking the Supreme Court's language in *Latsis* and *Papai*, petitioner argues that he believes "[t]he court below evidently believed that 'substantial in . . . nature' means work on the high seas." *See* Petition for Writ of Certiorari, at 7.

As pointed out by petitioner, not only is there "no precedent for that notion," *id.*, there is no evidence that the Ninth Circuit's decision turned on such a narrow and

confined reading of the "substantial in . . . nature" requirement announced in *Latsis*, 515 U.S. at 368. To the contrary, the Ninth Circuit's written decision documents the consideration of facts and issues far beyond the petitioner's restrictive premise, facts which support the Ninth Circuit's affirmation of the district court's decision.

Consider, for example, nowhere in the briefing papers to the Ninth Circuit, nor during oral arguments before the court, did the issue of work on the "high seas" or "open seas" versus the confined waters of Pearl Harbor come into play. Respondent never argued that under *Latsis* petitioner could not qualify as a seaman because he failed to work on the "high seas" or "open seas." Respondent did argue that petitioner was not regularly exposed to "perils of the sea" given the specific facts of this case. However, that is a far cry from arguing all seaman who work on barges in confined harbors are not seaman as a matter of law. The Ninth Circuit's fact specific inquiry into the unique facts of this case evidenced many undisputed facts indicating petitioner was a land-based worker, including but not limited to the fact that petitioner never plied the waters at all, much less the "high seas" or "open seas."

Thus, petitioner's attempt to jump from a conclusion of law based upon a fact specific inquiry into the totality of unique facts comprising this case to a conclusion of law based upon one fact, petitioner's failure to work on the "high seas" or "open seas," is misleading and does an injustice to the Ninth Circuit's complete analysis of this case. To grant certiorari under such circumstances would amount to this Court considering a hypothetical issue,

which was not determinative to the Ninth Circuit's analysis of this case. In addition, granting certiorari based upon the question presented by petitioner would do nothing to clarify or settle the law, as it is undisputed that the U.S. Supreme Court and Congress have never limited application of the Jones Act to individuals who work on the "high seas" or "open seas." The Ninth Circuit's decision in no way states otherwise.

In fact, the written decision of the Ninth Circuit confirms respondent's argument herein. If the determinative issue before the Ninth Circuit was work on the "high seas," as argued by petitioner, then why would the Ninth Circuit expressly focus on the fact petitioner did not work upon Barge 538 when it moved within the confined waters of Pearl Harbor on September 24, 1994 and September 25, 1994? *See* Petition for Writ of Certiorari, App. A at 10a. The answer is, the Ninth Circuit would not have focused on that fact, for under petitioner's analysis it would have been a moot point for the court to consider facts within Pearl Harbor when the court was arguably applying a test for seaman status which began at the "high seas."

In summary, petitioner's presented question incorrectly assumes the Ninth Circuit decided this case based upon a conclusion of law and interpretation of *Latsis* that a worker must work on the "high seas" to qualify as a seaman, a premise which is incorrect and unsupported by the Ninth Circuit's written decision.

THE NINTH CIRCUIT'S DECISION IS BASED UPON A FACT SPECIFIC INQUIRY IN A CASE WITH UNIQUE AND DISTINCT UNDISPUTED FACTS

As noted in *Latsis, supra* at 361, "the Jones Act inquiry is fundamentally status based: Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to the vessel takes them ashore."

In an effort to flesh out petitioner's status as either a seaman or a land-based maritime worker, the district court and the Ninth Circuit both focused on the unique and distinct undisputed facts in this case. "The distinction between the two mutually exclusive categories can be difficult to implement, and many cases turn on their 'specific facts'," *Papai, supra* at 1538. "The inquiry into seaman status is of necessity fact specific," *Wilander, supra* at 356. However, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Wilander, id.; see also Latsis*, 515 U.S., at 368-369, and *Papai*, 117 S.Ct., at 1540.

There is no question that the specific facts in this case are undisputed. This Court should note that at no time did petitioner ever suggest to the Ninth Circuit that a determination of his status was inappropriate for summary judgment. As such, it is a little late for petitioner to suggest, for the first time to the U.S. Supreme Court on certiorari, that "[a]t the very least, petitioner's status is a fact question that should have been decided at trial rather than on summary judgment." *See* Petition for Writ of

Certiorari, p. 10. This Court is reminded that petitioner was first to move for summary judgment on the issue of seaman status. Additionally, petitioner never exercised his right to a jury trial. As such, the fact question urged by petitioner would ultimately be decided by the same judge who entertained the initial motions for summary judgment, although under less stringent non-summary judgment standards.

After reviewing the specific facts of this case, both courts below agreed the undisputed historical facts unique to this case make summary judgment appropriate because the law will not reasonably support another conclusion. *See, e.g., Wilander, supra* at 356.

In his brief, petitioner avoids the specific facts of this case, facts which make summary judgment appropriate. Instead, petitioner focuses on a question which was never in issue below. As discussed previously, the courts below never wrestled with the issue of whether petitioner's operation of the crane on Barge 538 constituted work on the "high seas" or "open seas." Instead, both courts focused on the following specific facts:[5]

1. Petitioner was first hired by respondent on July 14, 1993 out of the union hall;

2. Petitioner was hired as a crane operator, not as a crewmember or deckhand;

3. Petitioner was assigned to various jobs by respondent;

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[5] Unless otherwise indicated herein with a specific cite, all listed arguments of fact are supported by respondent's Statement of the Case with cites to the record.

4. Petitioner was never assigned by respondent to a vessel or Barge 538;

5. Petitioner's employment chronology with respondent in the calendar years 1993 and 1994 included assignments to jobs "onshore", "on beach", "in yard", at "Kahe Power Plant, Oahu," at "Kal Hwy, Hawaii Kai, Oahu," at "Hickam Dormitory," and at "Hickam AFB", all of which were jobs on land and not related to any vessel on navigable waters. *See* R.11;

6. Petitioner's essential job duties never changed while working for respondent, as he always worked as a crane operator;

7. On August 15, 1994, petitioner was assigned by respondent to the Ford Island Ferry job to replace another crane operator pulled off the job by respondent;

8. The crane on the Ford Island Ferry job was located on Barge 538;

9. Petitioner was not hired to maintain Barge 538 and he did not maintain Barge 538;

10. Petitioner did not perform typical deckhand or crewmember functions on Barge 538, such as handling lines;

11. Barge 538 was moored adjacent to the shore and between mooring dolphins on its port and starboard sides;

12. Barge 538 never moved from its moored location while petitioner was onboard operating the crane;

13. Barge 538 did not contain bathroom, dining or sleeping facilities;

14. Petitioner accessed the crane on Barge 538 every day via a catwalk from the shore;

15. On September 24, 1994 and September 25, 1994, when Barge 538 was needed on a different job in a different location in Pearl Harbor, petitioner did not work on the vessel as the crane was not needed on that job;

16. On September 24, 1994 and September 25, 1994, since he was not a crewmember or deckhand on the vessel, petitioner did not assist in the movement of Barge 538 across the navigable waters of Pearl Harbor;

17. Other employees of respondent assisted in moving Barge 438 across the navigable waters of Pearl Harbor;

18. On September 26, 1994, after Barge 538 was repositioned in its moored location on the Ford Island Ferry job, petitioner was allegedly injured while stepping from the catwalk to Barge 538;

19. Petitioner filed a claim for benefits under the LHWCA on November 4, 1994;

20. Petitioner filed suit against respondent under the Jones Act on May 5, 1995.

As evidenced by the specific facts of this case, the courts below were armed with sufficient undisputed evidence to support their decisions that no reasonable jury or trier of fact could find petitioner a seaman should this matter proceed to trial. The historical facts of this case confirm that petitioner did not owe allegiance to the vessel, nor did he live his life upon the sea. Rather, he owed his allegiance as a crane operator to his land-based employer and the jobs to which he was assigned, the vast

majority of which were on land. The fact that petitioner did not work on the "high seas" or "open seas" played no part in the decisions of the courts below. The fact that petitioner was not regularly exposed to the perils of the sea was an important fact properly considered by the courts.

It is simply incorrect for petitioner to assume the Ninth Circuit's decision was intended to rule as a matter of law that all workers on vessels in confined harbors are non-seamen. This case does not stand for the global premise suggested by petitioner.

THERE IS NO CONFLICT WITH THE SUPREME COURT, OTHER CIRCUIT COURTS OF APPEAL OR STATE COURTS REGARDING THE QUESTION PRESENTED FOR REVIEW

As noted by the petitioner, this Court held in 1946 that the effect of Congress enacting the LHWCA of March 4, 1927 was "to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters." *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946). From that resuscitation of law, petitioner argues that this "is the only requirement relating to location" and that the Ninth Circuit was wrong when it imposed "a far more restrictive location test." *See* Petition for Writ of Certiorari, p. 8. However, petitioner fails to point out where, in its decision, the Ninth Circuit allegedly restricted the holding in *Swanson*.

In support of his argument, petitioner cites numerous cases in which deckhands and crewmembers of vessels plying the waters of lakes and harbors were found to be

seamen, as if this supports his argument the Ninth Circuit must have denied petitioner seaman status because he failed to work on the "high seas" or "open seas." A close examination of the specific facts of the cited cases, however, reveals numerous ways in which they are clearly distinguishable from the instant case. Simply put, there are sufficient distinguishable facts in each cited case to account for the Ninth Circuit's decision in the instant case, irrespective of any hypothetical issue regarding work on the "high seas" or "open seas."

For example, petitioner was not hired as a deckhand or crewmember on Barge 538. The record is undisputed that he was hired by respondent as a crane operator and that he never functioned as a crewmember or deckhand. In fact, petitioner was not called in to work on the two days in September of 1994 when Barge 538 actually moved across the navigable waters of Pearl Harbor. Why? Because he was not a crewmember on the vessel and he had no allegiance to the vessel. Petitioner was a crane operator and the crane was not required on the other job across Pearl Harbor. Yet, petitioner cites *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943), as support for his argument, when the issue before the Court in *O'Donnell* was clearly not seaman status. O'Donnell was admittedly a "deckhand . . . engaged in transporting sand . . . over the navigable waters of Lake Michigan." *Id.* at 38. In *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129 (1959), the petitioner was employed as a mate on respondent's barge. In *Southwest Marine, Inc. v.*

Gizoni, 502 U.S. 81, 84 (1991),[6] a case before the U.S. Supreme Court on certiorari to the Ninth Circuit, the petitioner was employed as "a rigging foreman" and he "worked on the floating platforms and rode them as they were towed into place." Further, petitioner "occasionally served as a lookout and gave maneuvering signals to the tugboat operator." *Id.* He also handled lines. *Id.* In *Norton v. Warner Co.*, 321 U.S. 565, 566-567 (1944), Rusin was employed as a "boatman on a barge." He "was continuously aboard" the barge, where he "lived, ate, and slept." *Id.* at 567. His duties, among others, included "taking general care of the barge," "taking care of lines at docks, tightening or slackening them as necessary," "taking lines from tugs" and "taking orders from the tugboat when being towed." *Id.* In *Warner v. Goltra*, 293 U.S. 155 (1934), petitioner was a master of a tugboat on the Ohio River. In *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957),

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[6] In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 83 (1991), this Court affirmed the Ninth Circuit's holding that the petitioner could be a seaman even though his work on vessels occurred in San Diego harbor. In its written decision in the instant case, the Ninth Circuit cited *Gizoni* in a footnote, noting that an employee is not a longshoreman as a matter of law "if genuine issues of material fact exist as to whether the worker was also a seaman under the Jones Act due to an employment-related connection to a vessel in navigation." *See* App. A, Petition for Writ of Certiorari, at 2a. Is the petitioner really suggesting that the Ninth Circuit ruled in the instant case contrary to its decision in *Gizoni*, a decision which was affirmed by the U.S. Supreme Court, without specifically discussing its departure from precedent? Surely not. The Ninth Circuit failed to discuss the fact that both Gizoni and petitioner in the instant case worked on vessels in harbors principally because it was not a determinative issue before the court.

petitioner was employed as a handyman to assist with dredging operations. There was testimony that petitioner was known as a "deckhand" and that "he was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, keep the dredge 'in shape.' " *Id.* at 372.

In each cited case, a fact-specific inquiry into the employee's connection to the vessel confirms that they are clearly distinguishable from the instant case. The same holds true for petitioner's citations to other circuit courts and state supreme courts.

It does injustice to the Ninth Circuit's decision to compare it to the cited cases on an issue not raised before the court ("high seas" or "open seas" versus confined harbor), while ignoring the specific facts of each case which support their respective legal holdings. The facts of this case are particularly unique and distinct and they were recognized as such by the district court and Ninth Circuit in ruling that petitioner was not a seaman as a matter of law.

POLICY CONSIDERATIONS SUPPORT THE NINTH CIRCUIT'S DECISION

As noted by the Court in *Latsis*, the U.S. Supreme Court authored numerous decisions on seaman status in the first half of the 1900's. 515 U.S. at 355-356. Beginning in the 1950's, the Court left further definition of seaman status to the lower courts. *Id.* at 356. Instead of clarifying the law, the lower courts "created a labyrinth and got lost in it." *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1060 (CA7 1984), *cert. denied*, 469 U.S. 1211 (1985).

During the period that the lower courts searched for workable criteria to define and apply seaman status, one scholarly voice, Professor David W. Robertson, repeatedly called upon the courts to provide "adequate guidance for distinguishing seamen from other maritime workers." Robertson, *A New Approach To Determining Seamen Status*, 64 TEX. L. REV. 79, 91 (1985), (hereinafter Robertson I), and Robertson, *The Law of Seaman Status Clarified*, 23 JOURNAL OF MARITIME LAW AND COMMERCE 1 (1992), (hereinafter Robertson II).

Specifically, Professor Robertson emphasized that:

> The courts would do better to drop the prolix "criteria" and "factors" approach and address directly the controlling policy issue: To what extent do the workers claiming seaman status in connection with the device or structure in question confront the characteristic seamen's dangers – perils of the sea or vessel-movement dangers."

Robertson II, pp. 14-15 (citations omitted).

With regard to decisions from the U.S. Supreme Court, while noting that a policy perception "was continually at work," Professor Robertson criticized the Court's status decisions for their "lack of searching discussions of the policies supporting special protections for seamen." Robertson I, p. 92.

In defining the policy considerations which he felt should be more directly addressed, Professor Robertson wrote:

> [T]he two policies at work in seaman status cases are, first, assuring the protection of the

> benevolent seamen's remedies to those workers who confront the characteristic seamen's hazards and, second, confining other maritime and amphibious workers to alternative remedial systems. The Supreme Court's law of seaman status makes the first goal paramount, but both are important.

Robertson I, at p. 93.

He also emphasized that "unless the underlying policy is kept firmly in mind and the developing doctrine continually checked against it, doctrine tends to proliferate and take on a life of its own." *Id.* at 83-84. Perhaps somewhat prophetic before the decision in *Latsis*, Professor Robertson acknowledged that "[s]ome workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seaman's protections." *Id.* at 93. *See also, Latsis, supra* at 361-362.

In defining the distinguishing characteristics of seamen's work, Professor Robertson included "[e]xposure to the 'perils of the sea' and to risks attending the movement of vessels on navigable waters." *Id.* at 80. Specifically, he wrote:

> We know what is meant by perils of the sea, even though we cannot expect to enumerate all of the possible instances or sub-categories. But any list would certainly include the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor.

Id. (citations omitted).

> When the duties of ship repairmen, longshoremen, and similarly situated inshore workers take them aboard a vessel, the ship is typically out of the water or at rest in calm inland water, securely moored or anchored. Such amphibious inshore workers, who do not confront the perils of the sea and who are seldom involved with vessel movement, face significant work-place hazards, but they are not subjected to the same physical and psychological risks that characterize a seaman's environment.

Robertson I, at 82 (citations omitted).

Respondent submits that even before *Latsis*, the state of general maritime law would have supported denying the petitioner herein seamen's status as a matter of law. As noted by Professor Robertson in 1985:

> The decisions sustaining summary judgment or directed verdict that inshore-barge workers were not seamen have stressed plaintiff's lack of significant involvement with vessel movement. It seems that the inshore-barge worker enjoys no implicit presumption of exposure to seamen's hazards and must convince the court that such exposure was a significant feature of his work.

Id. at 105 (citations omitted).

In discussing *Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960 (CA3 1979), *cert. denied*, 444 U.S. 833 (1979), Professor Robertson proposed language which he felt would have made the court's implicit policy perception explicit:

> A maritime worker who does not actually go to sea, and who therefore does not confront the

> perils of the sea in the course of his work, but who is injured while performing duties on a navigable vessel, must establish that his work involved significant exposure to the dangers attending the movement of vessels on navigable waters in order to recover under the Jones Act.

Robertson I, at 113.

In *Simko*, the plaintiff was "a barge cleaner who frequently worked on his employer's crane barge, firmly moored to the bank of the Ohio River." Robertson I at 112. After suggesting explicit language supporting the court's policy perception, Professor Robertson went on to suggest that it "would have supported a directed verdict for defendant on the status issue, inasmuch as plaintiff's work did not expose him to the perils of the sea or the dangers attending the movement of vessels." *Id.* at 113.

And that brings us squarely to the instant case. Professor Robertson did not suggest that the court in *Simko* deny the plaintiff therein seaman status because he worked on an inland waterway as opposed to the "high seas" or "open seas." Yet, he found sufficient factual evidence, supported by policy considerations, to opine that a directed verdict on the issue of seaman status would have been appropriate in that case. Similarly, in the instant case, the issue is not one of "high seas" versus inland waterways or confined harbors. The issue is one of degrees . . . to what extent has the worker (petitioner) been exposed to the perils of the sea, if any?

The Ninth Circuit and the district court both examined the specific facts of this case, expressly noting the seamen's status policy considerations strongly emphasized by the Court in *Latsis*, before deciding that as a

matter of law, no reasonable jury or trier of fact could find petitioner a seaman. This Court should recognize that the Ninth Circuit's decision is consistent with the policy considerations set forth in *Latsis* and is in no way based upon a finding that petitioner failed to work on the "high seas" or "open seas." The Ninth Circuit did not have to consider whether petitioner worked on the "high seas" or "open seas" because the undisputed evidence showed he was never significantly exposed to the perils of the seas at all. Petitioner was never located a great distance from the shore. Petitioner was never in relative isolation. Petitioner was never denied the accessibility of shore-side facilities. Petitioner was never exposed to wind and weather conditions different from that affecting the land a catwalk distance away. And most importantly, petitioner presented no evidence that he was significantly exposed to the dangers attending the movement of vessels on navigable waters. Bottom line: Petitioner failed to put forth any evidence suggesting the seaman status policy considerations emphasized in *Latsis* supported his claims as a seaman. The only evidence put forth regarding movement of the vessel in this case was that petitioner was not on the barge when it moved across Pearl Harbor in September 1994. Thus, not only do the undisputed facts in this case support the Ninth Circuit's decision, but so do the policy considerations set forth in *Latsis*.

PETITIONER'S "SERIOUS IMPACT" ARGUMENT IS MISPLACED AS THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISION AND ORDER OF ALJ PAUL MAPES, DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAM (OWCP 15-39103), FOLLOWING AN ADMINISTRATIVE TRIAL ON FEBRUARY 2, 1996

Petitioner's second major argument is that the Ninth Circuit's decision will seriously impact seamen, their employers and the Department of Labor. Petitioner's argument necessarily assumes this Court agrees the Ninth Circuit intended, by its decision in this case, to add a requirement for work on the "high seas" to seaman status. Assuming the Court agrees with respondent that the Ninth Circuit did not so rule, petitioner's argument becomes moot.

However, respondent should also note that contrary to petitioner's suggestion, this is not a case of the Ninth Circuit thrusting unwelcome maritime workers onto the back of the Department of Labor. Recall that petitioner first filed for LHWCA benefits on November 4, 1994. Petitioner's claim went to administrative trial on February 2, 1996 before ALJ Paul Mapes. Inasmuch as the district court's decision had been appealed to the Ninth Circuit at the time of the trial, ALJ Mapes specifically noted that the district court's decision would not have collateral estoppel effect on his decision. As such, ALJ Mapes considered whether the Department of Labor had jurisdiction over petitioner during trial. After receiving testimony, exhibits and briefings from the parties, ALJ Mapes issued his decision and order in OWCP 15-39103 on April 5, 1996, independently finding that petitioner

was a longshoreman under the LHWCA. Petitioner, who was represented by counsel and testified during his administrative trial, did not appeal ALJ Mapes' decision and order on jurisdiction and longshoreman status.

Although respondent believes petitioner's failure to appeal ALJ Mapes' decision and order on jurisdiction and longshoreman status should operate as collateral estoppel to petitioner's continued pursuit of conflicting claims under the Jones Act, respondent is confident this Court will at least recognize the significance of the Department of Labor's decision consistent with the decisions of the district court and Ninth Circuit.

Petitioner has availed himself of the two major mutually exclusive remedial schemes available to maritime workers. He has patiently, and at great expense to respondent, simultaneously proceeded up both remedial ladders and he has received consistent decisions every step of the way. In fact, he reached the top of the LHWCA ladder and received a decision and order finding entitlement to benefits. By failing to appeal the decision and order of ALJ Mapes to the Benefits Review Board, respondent contends petitioner has elected his remedy. Nevertheless, petitioner continues his pursuit up the Jones Act ladder in the hope that he will one day convince some court that he should be entitled to Jones Act remedies. And what happens then? Having reached the top of both mutually exclusive ladders, an irony in and of itself, is petitioner then allowed to pick and choose the remedial scheme under which he would like to accept benefits? There are no easy answers to the complicated predicament petitioner hopes to create by his continued appeal of the Ninth Circuit's decision.

In *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 426 (CA5 1992), the court held that the LHWCA was not designed to create a safety net for workers, guaranteeing a minimum award as they seek greater awards in court. *See also Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-1133 (CA5 1991). That appears to be the primary purpose behind petitioner's actions in this case. Meanwhile, respondent has been forced to retain counsel and defend its interest under two mutually exclusive remedial schemes. This Court should not further petitioner's cause by granting certiorari.

CONCLUSION

Both the Ninth Circuit and the district court properly focused upon "the essence of what it means to be a seaman." *Latsis, supra* at 369. The petition for writ of certiorari, which raises a hypothetical issue not considered by the courts below, should be denied.

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April 10, 1998

MOTION FILED
APR 20 1998

(3)

Supreme Court No. 97-1346

In The

Supreme Court of the United States

ROBERT CABRAL,

v.

HEALY TIBBITTS BUILDERS, INC.,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* INLAND BOATMEN'S UNION OF THE PACIFIC, COLUMBIA RIVER REGION IN SUPPORT OF PETITIONER ROBERT CABRAL

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17 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movant, Inland Boatmen's Union of the Pacific, Columbia River Region (IBU), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by Robert Cabral.

Petitioner has given his consent to the filing of movant's proposed brief, and a copy of his attorney's letter granting consent is being filed with the Clerk of the Court. Respondent has not consented to the filing of this brief. Movant accordingly files this motion pursuant to Rules 21.2(b) and 37.2.

Movant is a labor union consisting of 485 members. Most of this union's members work as "brown water" seamen plying the inland navigable waters of the Pacific Northwest (the Columbia, Snake and Willamette Rivers) as operators and deckhands on tugboats and towboats.

The Inland Boatmen's Union of the Pacific (IBU) was organized in San Francisco, California on November 20, 1918. From 1918 through December 1931, the activities of the union were confined to the San Francisco Bay area. Divisions of the union were then founded in the Columbia River area and the Puget Sound area. Today, the IBU represents members working over the entire area encompassing states bordering the Pacific Ocean.

III

From September 1937 until April 1, 1948, the Union was affiliated with the Congress of Industrial Organizations (CIO). On April 1, 1948, the Union became affiliated with the Seafarer's International Union of North America. This affiliation was terminated in December 1979. On October 31, 1980, the IBU affiliated with the International Longshoreman's and Warehouseman's Union (ILWU).

Since the 1950's, the tugboat and ferryboat industries have increased in size in correlation with an increase in the amount of interstate and oceangoing commerce in the Pacific Ocean area. The IBU represents its members in a united effort to achieve uniformity in wages, hours and working conditions for those people employed in these maritime industries.

The decision from the Ninth Circuit in the present case is particularly alarming to the IBU - Columbia River Region. As is detailed in movant's proposed *amicus curiae* brief, the members of this union face the same risks and dangers as those encountered by "blue water" seamen, and should be entitled to the same protection under the Jones Act as "blue water" seamen. The IBU is particularly concerned with access to the courts for its members, and with the Jones Act and its traditional application to "brown water" seamen.

For these reasons, movant respectfully requests leave to file the attached *amicus curiae* brief in support of the petition for certiorari filed by Robert Cabral.

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BRIEF OF *AMICUS CURIAE* INLAND BOATMEN'S UNION OF THE PACIFIC, COLUMBIA RIVER REGION IN SUPPORT OF PETITIONER ROBERT CABRAL[1]

[1] This *amicus* has received consent from Petitioner, but not from Respondent, to file this brief. Accordingly, *amicus* has filed a Motion for Leave to File this brief. This proposed brief has been filed within the time allowed for filing a brief in opposition to the Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE[2]

The interest of *amicus curiae* Inland Boatmen's Union of the Pacific, Columbia River Region is described in detail in the Motion for Leave to File this brief.

ARGUMENT

EXCLUDING "BROWN WATER" SEAMEN FROM COVERAGE UNDER THE JONES ACT RUNS AFOUL OF THE COURT'S HISTORICAL DEVELOPMENT OF THE ADMIRALTY JURISDICTION.

At the time of the adoption of the Constitution, the admiralty law of the United States was essentially the same as that of England. *The Steamboat Thomas Jefferson*, 23 US 428 (1825). In England, the term "navigable waters" meant waters that were subject to the ebb and flow of the tide. *Id.* That rule had developed because, in England, waters beyond the ebb and flow of the tide were generally not navigable in fact. *The Propeller Genesee Chief v. Fitzhugh*, 53 US (12 How.) 443, 454 (1851). That is not, however, the case in the United States.

In *Illinois Central Railroad v. Illinois*, 146 US 387, 406 n3 (1892), Justice Field stated the distinction well:

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[2] Pursuant to Rule 37.6, this amicus attests that no counsel for either party authored the brief, in whole or in part, nor has any party or its counsel made a monetary contribution to the preparation or submission of this brief.

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of rivers, and that is found in their navigable capacity.

An early Commission of Vice-Admiral to Lord Cornbury, Governor of New York (then a British colony) described the Admiralty jurisdiction of that colony as including "the public streams, ports, rivers, fresh waters and creeks whatsoever within our maritime jurisdiction aforesaid . . ." ELIJAH E. JHIRAD AND ALEXANDER SANN, BENEDICT ON ADMIRALTY, Chapter 5-10, § 65 (7th Ed. 1974).

In *Waring v. Clarke*, 46 US (5 How.) 441 (1847), the Court sustained admiralty jurisdiction over a collision between two vessels on the Mississippi River 90 miles above New Orleans. The Court observed that the admiralty jurisdiction "extends to tide waters, as far as the tide flows, though it may be infra corpus comitatus." ["within the body of a county"] 46 US at 464.

In *The Propeller Genesee Chief v. Fitzhugh*, *supra*, the Court completed the cycle and overruled *The Steamboat Thomas Jefferson*. *Fitzhugh* was a negligence and property damage case arising from a collision between two vessels on Lake Ontario. The Court was called upon to determine whether an 1845 Act of Congress (5 Stat. at Large 726), extending the jurisdiction of the district courts to certain cases upon the Great Lakes and navigable waters connecting the Great Lakes, was Constitutional. Chief Justice Taney posed the question as follows:

> If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted.
>
> If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting

> waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have been encountered on them, and prizes have been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes.
>
> - *The Propeller Genesee Chief v. Fitzhugh*, 53 US at 453.

Noting with some "embarrassment," 53 US at 456, the precedent of *The Steamboat Thomas Jefferson, supra*, the Court held that "The lakes and waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." 53 US at 457. *And see Jackson v. The Steamboat Magnolia*, 61 US (20 How.) 296 (1857); *The Eagle*, 75 US (8 Wall.) 15 (1868).[3]

The significance of the historical development of the admiralty jurisdiction in this

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[3] The "tidal test," incidentally, has long since been abandoned in England as well. GUSTAVUS H. ROBINSON, ROBINSON ON ADMIRALTY 33 n41 (1939).

country is that The Jones Act, 46 USC § 688, was passed in 1920 to afford protection to all seamen plying in "navigable waters." *Swanson v. Marrra Brothers, Inc.*, 328 US 1, 7 (1946). The Jones Act, in extending the right of recovery to seamen injured by negligence while in the service of a vessel, "...did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction." *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 US 36, 43 (1943). The Jones Act is liberally construed to carry out its purpose, which was to enlarge protection for seamen, who are the "wards of admiralty." *Garrett v. Moore-McCormack Co.*, 317 US 239, 247, 248 (1942).

In other words, although most of the cases cited above interpret the scope of the admiralty jurisdiction under Article III, § 2 of the United States Constitution, and not the Jones Act specifically, they constitute the base of maritime law on which the seaman's rights under the Jones Act are built. "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." *O'Donnell, supra*, 318 US at 42, 43.

The Ninth Circuit decision here runs contrary to the Court's historical development of the admiralty jurisdiction in extending it to cover all navigable waters. "Brown water" seamen, as noted by Chief Justice Taney, in *The Propelller*

Genesee v. Fitzhugh, *supra*, face the same risks and dangers as those seamen who work on vessels in the ocean. 53 US at 453.

Under the general admiralty law, several cases have interpreted the term "perils of the sea" (usually in the context of insurance) to include those perils faced on inland waterways. *See, e.g. Delano Coal Co. Inc. v. Barge Blue Rock*, 1928 AMC 1359 (SDNY)(A broken plank on a barge traveling up the North River held to be the result of a peril of the sea); *Klein v. Globe & Rutgers Fire Insurance*, 2 F.2d 137 (CA 3 1924)(A steamer being towed on the Mississippi River sprang a leak after rough waters overnight gave the vessel "a good shaking up." The damage was held to be caused by a "peril of the sea" rather than unseaworthiness.); *Spooner & Son v. Connecticut Fire Insurance Co.*, 314 F.2d 753 (CA 2 1963)(Crane barge on the East River; unanticipated swells were a "peril of the sea.")

The assertion that only blue water seamen face the risks and dangers associated with "going down to sea" is belied by this nation's history of tragedies on inland waterways. For example, the greatest ever loss of passengers "at sea" occurred when the EMPRESS OF IRELAND sank in the Saint Lawrence River on May 18, 1914. Over 1,000 lives were lost when the vessel collided with the Norwegian coal freighter STORSTAD in a thick fog. This disaster happened, ironically, after passengers had been assured that one-third of their voyage from Quebec to Liverpool would be passed "in the relative tranquility of a great inland

sea." JAMES CROALL, FOURTEEN MINUTES, THE LAST VOYAGE OF THE EMPRESS OF IRELAND 11 (1978).

Perhaps the most famous of this country's disasters at sea was the wreck of the EDMUND FITZGERALD. On November 10, 1975, the 729-foot, 25,891 ton vessel was torn apart, literally twisted in half by gale winds of up to 90 miles per hour on Lake Superior. There were no survivors of her crew of 29. ROBERT J. HEMMING, GALES OF NOVEMBER, THE SINKING OF THE EDMUND FITZGERALD (1981). *And see* DAVID D. SWAYZE, SHIPWRECK! A COMPREHENSIVE DIRECTORY OF OVER 3,700 SHIPWRECKS ON THE GREAT LAKES (1992).

Many of our nation's larger lakes and rivers are indeed "inland seas." 53 US at 453. Therefore, the term "go down to sea," as used by the Court in its most recent cases on this subject[4], and by the Ninth Circuit in this case, (*see* Appendix to Petition for Writ of Certiorari at 10a), must necessarily include working as a seaman on this country's vast network of navigable harbors, lakes, rivers and streams.

The term "sea" is a word of "wide extension and application." BENEDICT ON ADMIRALTY, Ch. 7-6, § 103. "Its classical and scriptural equivalents are applied to all sorts of navigable waters. It is not restricted, even in the common speech, to waters where the tide ebbs and flows, for the Baltic Sea, the Black Sea, the Sea of Azof, the Sea of Mamora,

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[4] *Chandris v. Latsis*, 515 US 347, 115 SCt at 2190 (1995); *Harbor Tug and Barge Co. v. Papai*, 117 SCt 1535, 1540 (1997)("The inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea.")

the Mediterranean Sea, the great scenes of early maritime enterprise, had no visible tide." *Id.*

The Court should recognize its precedent with regard to navigable waters in conjunction with the scope of the admiralty jurisdiction by declaring that "brown water" seamen are entitled to the same protections as their blue water kin. Any other rule would return the Court to the antiquated English rule in which the admiralty jurisdiction was governed by the ebb and flow of the tide.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: April 20, 1998.

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In The

Supreme Court of the United States

October Term, 1997

ROBERT CABRAL,

Petitioner,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

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PETITIONER'S REPLY BRIEF

Petitioner Robert Cabral respectfully submits this Reply to Respondent's Brief in Opposition.

I. THIS CASE FAIRLY RAISES THE QUESTION PRESENTED

Respondent makes no attempt to defend the Ninth Circuit's holding that an injured employee must work on the high seas (as opposed to the navigable waters of an ocean harbor) to satisfy the *Chandris* requirement that a seaman have a substantial connection to a vessel. Indeed, respondent recognizes that this holding is unprecedented, Brief in Opposition ("Opp. Br.") at 6, and concedes that Congress has not so limited the application of the Jones Act, *id.* at 8. Respondent instead seeks to recharacterize the opinion below. *Id.* at 6-16. The Ninth Circuit, however, has confirmed that the decision below turns on whether the injured employee goes to sea, and defendants in other Jones Act cases are already citing it as authority for the proposition that "brown-water" seamen – *i.e.*, those who do not work on traditional ocean-going vessels – do not qualify for Jones Act coverage. Moreover, respondent's attempted recharacterizations are also inconsistent with this Court's recent rulings.

A. THE PROPER READING OF THE OPINION

Although respondent implies that the lower court's emphasis on the need to go "to sea" was merely rhetorical excess, the Ninth Circuit's entire discussion of *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), builds to

the conclusion that when an employee's work is "not of a seagoing nature," his connection to the vessel is insufficient to justify seaman status. *See* Petition for Certiorari ("Petn.") Appendix A ("App. A") at 8a-9a. The critical language in this passage is focused on the importance of " 'whether the employee's duties take him to sea,' " *id.* at 9a (quoting *Papai*, 117 S. Ct. at 1540), on whether the putative seaman's "work . . . was . . . of a seagoing nature," *ibid.* The test that the court derives from *Papai* and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and applies to the facts of this case, turns entirely on whether the employee went to sea. *See* Petn. App. A at 9a-10a. The Ninth Circuit concludes this paragraph by emphasizing that the Jones Act is reserved for those "who go down to sea in ships." *Id.* at 10a.

In *Perez v. Keystone Shipping Co.*, 1997 U.S. App. LEXIS 33804 (9th Cir. Nov. 28, 1997) (No. 96-55994), the Ninth Circuit confirms this reading. The employer there cited the court of appeals' decision in the present case in defense of a summary judgment in its favor on the seaman status issue. Reversing, the court distinguished its earlier case as follows:

> Keystone's reliance on *Cabral v. Healy Tibbitts Builders, Inc.*, 118 F.3d 1363 (9th Cir. 1997), is unavailing. In *Cabral*, the plaintiff was injured while working as a crane operator on a vessel that was docked at Pearl Harbor. The court found that as a matter of law, the plaintiff could not qualify as a seaman under the Jones Act, despite the fact that he had spent approximately ninety percent of his work time on the ship. *Id.*

at 1366. The present case easily can be distinguished from *Cabral*, however, because Perez was injured while the vessel was at sea.

Respondent may be the only employer of brown-water seamen in the Ninth Circuit who has not yet appreciated the implications of the decision below. Part of the reason that this case has generated such concern among those who represent brown-water seamen on the West Coast (such as the unions who appear as *amici* before this Court) is the frequency with which brown-water seamen bringing Jones Act cases now face summary judgment motions based on the Ninth Circuit's decision. In Appendix A, *infra*, we reprint the relevant passages from two such motions to give this Court a flavor of how the decision below is being used in practice. These motions offer further confirmation that the decision below does indeed raise the question presented in the petition.

B. THE RESPONDENT'S READING OF THE OPINION

If the Ninth Circuit did not mean what it said in its discussion of the need to go to sea, respondent offers no other acceptable explanation for the judgment. The two explanations suggested in the Brief in Opposition are contrary to recent decisions by this Court that the court of appeals discussed in its opinion.

Just as the district court looked to petitioner's "overall employment as a crane operator," rather than "the brief period" of his current employment with the respondent, Petn. App. C at 28a, so the focus of respondent's argument in this Court is on petitioner's "more enduring

period of employment with respondent from 7/14/93 through 10/27/94." Opp. Br. at 2 n.2.[1] This reasoning cannot explain the Ninth Circuit's decision, however, because it is flatly inconsistent with *Latsis* and *Papai*. In *Latsis*, for example, this Court wrote: "When a maritime worker's basic assignment changes, his seaman status may change as well. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." 515 U.S. at 372. Not only did petitioner's basic assignment change, he left the respondent's employment entirely for 2½ months and had to be rehired. *Papai* is perhaps even more directly on point, for the Court there describes the injured employee's twelve prior employments with the vessel owner during the 2½ months before his injury as "discreet engagements [that] were separate from the one in question." 117 S. Ct. at 1542.

Alternatively, respondent hints at several points that petitioner is not entitled to Jones Act coverage because he

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[1] Respondent seems to suggest that petitioner has taken inconsistent positions with respect to the appropriate period of employment. *See* Opp. Br. at 2 n.2. It is true that petitioner argued before the Ninth Circuit that he spent between 30% and 36% of his time on vessels over the longer period of employment considered by the district court, whereas he spent over 90% of his time on Barge 538 during the relevant period of employment. The argument cited by respondent, however, was made in the alternative, in case the court of appeals failed to recognize the appropriate period of employment. The relevant passage from petitioner's Opening Brief to the Ninth Circuit is reprinted in Appendix B, *infra*.

"was not responsible for operating or maintaining the barge," Opp. Br. at 3; *cf. id.* at 11, and he did not "function[] as a crewmember or deckhand," *id.* at 3; *cf. id.* at 10, 12, 14. These passages seek to characterize the decision below as holding that petitioner did not qualify for Jones Act coverage because he operated the crane rather than the vessel. This recharacterization cannot explain the Ninth Circuit's decision. It is inconsistent both with this Court's holding in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), which rejected an "aid of navigation" requirement, and with the court of appeals' own recognition that petitioner's duties contribute to the vessel's function. *See* Petn. App. A at 7a.

C. SUMMARY

In sum, the Ninth Circuit not only emphasized that an employee must "go to sea" to qualify for Jones Act coverage, but read this as a requirement that he work on the high seas. No other explanation for the Ninth Circuit's decision withstands scrutiny. We can only conclude that the court of appeals meant what it said, and that it has imposed a requirement on West Coast employees that does not apply in any other circuit.

II. RESPONDENT'S "POLICY CONSIDERATIONS" ARE BOTH MISPLACED AND INCONSISTENT WITH THIS COURT'S DECISION IN *LATSIS*

Relying on the scholarly work of Professor David W. Robertson, respondent argues that policy considerations

support the decision below. Opp. Br. at 16-21. This argument is both misplaced and inconsistent with this Court's decision in *Latsis*.

In *Latsis*, this Court considered and rejected these same policy arguments (raised in a brief authored by Prof. Robertson). The Court instead held that "[s]eaman status is not coextensive with seamen's risks." 515 U.S. at 361. If the Court wishes to reconsider this holding, it should be after plenary consideration.[2] It is not the Ninth Circuit's role to adopt a policy-based rationale that this Court has rejected.

In any event, respondent's argument is misplaced, for crane operators working on moored barges do face the "perils of the sea" as Prof. Robertson uses the term. *See generally* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79, 80-81 (1985). Working from a floating vessel that moves, rolls, pitches, and yaws with the sea is a different – and more perilous – job than operating a shoreside crane that stands firmly on solid ground. Indeed, it appears that petitioner was injured when he slipped on some mud that had been dredged from the harbor bottom and left on the barge the previous day when the vessel had weighed anchor. This is a risk that is unique to those who work on the water, and would not be faced by a crane operator on the land. Petitioner's exposure to the perils of the sea is not more

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[2] If the Court wishes to reconsider Prof. Robertson's policy arguments, this would be a particularly appropriate vehicle for doing so. Prof. Robertson would argue the case for petitioner if certiorari were granted, and thus the Court would have the opportunity to probe his views.

fully developed in the record and the proceedings below only because petitioner did not have fair notice that this factor would be determinative, as indeed *Latsis* had held that it was not.

III. RESPONDENT'S LHWCA ARGUMENT IS IRRELEVANT AND UNFOUNDED

Finally, respondent suggests that petitioner's actions in seeking compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50, is inconsistent with his claim to seaman status here. *See* Opp. Br. at 22-24. This argument is irrelevant and unfounded.

Because of the confusion surrounding seaman status, many seamen seek LHWCA benefits while pursuing Jones Act remedies. There is no risk of double recovery, however, because any LHWCA payments operate as a credit against the Jones Act verdict, and vice versa. *See* LHWCA § 3(e), 33 U.S.C. § 903(e); *Biggs v. Norfolk Dredging Corp.*, 360 F.2d 360 (4th Cir. 1969). The fact that petitioner sought LHWCA benefits here is not a reason to deny certiorari; instead it is a powerful argument for the need to grant certiorari and clarify the confusion that imposes on injured workers the need to pursue parallel proceedings.

In any event, respondent's argument is factually unfounded. Even in the LHWCA proceeding, petitioner contended that he qualified as "a 'seaman' as that term is used in the Jones Act, and is therefore entitled to seek the various remedies provided in that legislation." *Cabral v. Healy Tibbitts Builders, Inc.*, 30 BRBS 484, 488 (ALJ 1996) (OALJ No. 95-LHC-1763; OWCP No. 15-39103). Furthermore, contrary to respondent's claim, ALJ Mapes did not

"independently find[] that petitioner was a longshoreman under the LHWCA." Opp. Br. at 22-23. He simply "adopt[ed] the conclusions of the District Court." 30 BRBS at 488.

IV. CONCLUSION

The petition for a writ of certiorari should be granted. In view of respondent's concession that "Congress [has] never limited application of the Jones Act to individuals who work on the 'high seas' or 'open seas,' " Opp. Br. at 8, the Court may also wish to consider summary reversal as an alternative procedure for clearing up the confusion created by the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX A

Memorandum of Points and Authorities in Support of Manson Construction Co.'s Motion for Summary Adjudication Pursuant to CCP 437(c)(f)(1), *Baker v. Manson Construction & Engineering Co.*, No. 986153 (Cal. Super. Ct., San Francisco County, 1997), at 6:

> The *Cabral* court held that the purpose of the focus on the "substantial nature" (of the plaintiff's connection to a vessel) is "to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks." *Cabral, supra,* 118 F.3d at 1366 [*cf.* Petn. App. A at 10a]. The Ninth Circuit further noted that "[t]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's *duties take him to sea.*" *Cabral, supra,* 118 F.3d at 1366 [*cf.* Petn. App. A at 10a] (quoting *Papai, supra,* 117 S. Ct. at 1540) [emphasis supplied by author of memorandum]. The *Cabral* court concluded that even though he was operating a crane on board a barge located in the water, Cabral's work did not expose him to sea-based hazards, and therefore he did not have the requisite connection to a vessel to be a Jones Act "seaman." *Cabral, supra,* 118 F.3d at 1366 [*cf.* Petn. App. A at 10a-11a].

Memorandum of Points and Authorities in Support of Defendant Connolly Pacific Co.'s Motion for Summary Judgment or, in the Alternative, for Summary Adjudication, *Barton v. Connolly Pacific*, No. NC 020911 (Cal. Super. Ct., Los Angeles County, 1997), at 15-16 & n.6:

> On this issue [seaman status], this case mirrors the Ninth Circuit case of *Cabral v. Healy*

Tibbitts Builders, Inc., 97 Daily Journal D.A.R. 12902 (9th Cir. October 16, 1997), in which the court found that a crane operator working 90 percent of his worktime aboard a crane barge on a construction project in Pearl Harbor was not a seaman for Jones Act purposes.[6] In examining whether the plaintiff had a connection to a vessel in navigation that was substantial in terms of duration and nature, the court focused on whether the plaintiff's duties were primarily sea-based. The Ninth Circuit in *Cabral* concluded that the plaintiff was a land-based worker who was hired to work on the barge as a crane operator and not as a crewmember. It emphasized that the plaintiff presented no evidence showing that he was ever aboard the barge when it was anywhere but the Ford Island Ferry Project or that he would have continued to work aboard the barge once the project was completed. Thus, the plaintiff was held as a land-based crane operator who happened to be assigned to a project which required him to work aboard a barge. Thus, he was not a seaman.

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[6] For the purposes of its analysis, the *Cabral* court assumed that the barge was a vessel.

APPENDIX B

Plaintiff-Appellant Robert A. Cabral's Opening Brief, *Cabral v. Healy Tibbitts Builders, Inc.*, 128 F.3d 1289 (CA9 1997) (No. 95-16476), at 16:

> *Chandris, Inc. v. Latsis, supra,* does not support the proposition that Cabral's duties for defendant before he was terminated/discharged on or about June 1, 1994 should be considered in determining Cabral's status as a seaman. Indeed, the plaintiff in *Chandris,* although he had a mix of land based and sea based employment, was in fact continuously employed by the same employer. Cabral was not. Cabral last worked for defendant about 2½ months before he was hired to work on Barge 538 by defendant.[1] In between he worked for another employer and was unemployed. Being discharged and rehired is a new work assignment and seaman's status should be determined based on the new assignment.

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[1] Interestingly, depending on how one does the mathemation [sic], even if his pre-termination/discharge employment is considered, an argument could be made that Cabral spent between 30-36% of his time on defendant's vessels. ER 11-12. Some courts find seaman status if more than 30% of the time is spent on a vessel. *Chandris, Inc. v. Latsis, supra* at *12 [515 U.S. at 371].